Supreme Court, U.S.
FILED

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No. 10-1013 05

IN THE

Supreme Court of the United States

SHELLEY EVANS-MARSHALL,
Petitioner,

v.

BOARD OF EDUCATION OF THE TIPP CITY EXEMPTED VILLAGE SCHOOL DISTRICT, CHARLES T. WRAY, AND JOHN T. ZIGLER,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should *Garcetti v. Ceballos*, 547 U.S. 410 (2006) be extended to hold that all in-class speech by teachers in the public schools is categorically unprotected by the First Amendment?

LIST OF PARTIES

The plaintiff-appellant and petitioner is Shelley Evans-Marshall.

The defendant-appellees and respondents are the Board of Education of the Tipp City Exempted Village School District, Charles T. Wray, who was the Principal of the public high school in Tipp City, and John T. Zigler, who was the Superintendent of the public schools in Tipp City. The respondents Wray and Zigler are joined in their individual capacities.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, dated October 21, 2010, and the Order Denying Rehearing and Rehearing En Banc dated January 25, 2011, are officially reported at 624 F.3d 332 and are reproduced at Appendix A and B, respectively.

The Decision and Entry Sustaining Defendant's Motion for Summary Judgment by the United States District Court for the Southern District of Ohio, dated July 30, 2008, is reported at 2008 WL 298174, and is reproduced as Appendix C.

The Opinion of the United States Court of Appeals for the Sixth Circuit, dated November 1, 2005, is reported officially at 428 F.3d 223, and is reproduced as Appendix D.

The Decision and Entry Overruling Defendants' Motion to Dismiss by the United States District Court for the Southern District of Ohio, dated March 16, 2004, is unreported and is reproduced as Appendix E.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 21, 2010. The Court of Appeals denied Evans-Marshall's Petition for Rehearing or Rehearing En Banc on January 25, 2011. This petition is timely under 28 U.S.C. § 2102(c) and Supreme Court Rule 13.1 because it is filed within 90 days of the date of the denial of the petition for rehearing. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press..."

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

> thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 42, Section 1983 of the United States Code provides in relevant part as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..."

STATEMENT OF THE CASE

A. The Sixth Circuit extends *Garcetti* by declaring that all-in class speech by teachers in the public schools is categorically unprotected by the First Amendment.

The Sixth Circuit found that the petitioner, a high-school English teacher, had presented sufficient evidence to show that the school board had failed to renew her contract because school officials and their constituents objected to the ideas presented in the classic works of literature that she had either assigned or proposed to assign to the students in her 9th and 11th -12th grade classrooms.

In particular, the Sixth Circuit found that school officials had terminated Evans-Marshall because a vocal segment of the town's citizens strenuously objected to her school-approved use of Herman Hesse's novel *Siddhartha*, which refers in general terms to sex outside marriage, and to her decision, subsequently reversed by the school administration, to allow her students' the choice of reading Leslea Newman's classic children's book *Heather Has Two Mommies*, which refers in general terms to lesbian couples as normal and decent parents.

On the petitioner's first appeal to the Sixth Circuit, the court found that the petitioner had stated facts sufficient to defeat a motion to dismiss under the Circuit's established precedent in *Cockrel v. Shelby County School District*, 270 F.3d 1036 (6th Cir. 2001), *cert. den. sub. nom. Shelby County School Dist. v. Cockrel*, 537 U.S. 837 (2002). Apx., 71a-102a. On her second appeal, which is the subject of this petition, the Sixth Circuit held that she had produced sufficient facts to defeat a motion of summary judgment under that precedent, which protected in-class curricular speech under the standards set forth in this Court's decisions in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). Apx. 1a-22a.

In this most recent decision, the Sixth Circuit found that the petitioner established all three elements required to set forth a claim under the *Pickering-Connick* standard. On the first element, it declared that *Siddhartha*, *Heather Has Two Mommies* and the other works at issue were unquestionably speech on "matters of public concern." Apx., 11a. On the second element, it declared that the petitioner's interest in that speech outweighed the school board's

"near-zero" interest in disciplining her for it. Apx., 11a-12a. On the third element, it found that she had produced evidence that, if believed, was sufficient to support a verdict that her contract had not been renewed *because* of that speech. Apx., 12a-13a.

But then the Sixth Circuit held that the petitioner's claim had to be dismissed altogether. Deciding an issue that this Court had specifically left open in *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), the Sixth Circuit held that *Garcetti* should apply with full force to speech by teachers in the public schools. The protections of the First Amendment, the Sixth Circuit held, do not apply to any "...in-class curricular speech of teachers in the primary and secondary schools made 'pursuant to' their official duties." Apx., 2, citing *Id.*, at 421. Whatever the school board's motive for firing the petitioner may have been, the Circuit declared, is "beside the point," because all in-class speech by teachers is unprotected. Apx., 13a.

For the reasons set forth below, there is no question that the Sixth Circuit decided an issue that this Court explicitly left open in *Garcetti*, no question that the circuits are deeply split over whether teachers' in-class speech is categorically unprotected, and no question that the assertion that the First Amendment places no limit on the right of school officials to fire teachers because of the content of their in-class speech is an issue that is of fundamental importance to teachers, to students, to public education, and to the Nation.

Before addressing those legal issues, however, Evans-Marshall summarizes the facts that rightly led the Sixth Circuit to conclude that the issue left undecided in *Garcetti* was clearly, cleanly, and necessarily presented for decision here. The facts are presented

in the light most favorable to the plaintiff, and, with the exception of a few facts from the record that make the retaliatory motive even clearer, the facts set forth below are taken from the opinion of the Sixth Circuit.

B. The Tipp City School District authorized Evans-Marshall to engage in the speech that led to her termination.

In June 2000, the Tipp City School District, located just outside Dayton, Ohio, hired Evans-Marshall to teach 9th grade college-preparatory English, 11th grade college-preparatory American Literature, and 11th-12th grade Creative Writing. Apx., 2a. She received excellent reviews in her first year and her contract was renewed for the 2001-2002 academic year. Apx., 12a; R. 31-5, 22-26, 28-32.[1]

The school district provided the petitioner with the basic textbooks that were to be used in her 9th grade English class and her 11th grade literature class. In both of those classes, however, the school district allowed its teachers to select and assign supplemental reading materials. Moreover, in the Creative Writing class, the school district did not adopt a textbook at all, but rather gave Evans-Marshall full authority to select or write the materials to be used in the class. R. 31-1, 22, 27-28.

The District provided little, if any, written guidance to Evans-Marshall or to any other teacher on the supplemental materials that they could use. Its

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[1] "R." refers to the record number on the electronic record of this case in the Southern District of Ohio. The page numbers refer to the page number at the top of the electronic record, which are not necessarily the same as the page number in the deposition transcript or in the original document.

general academic policies, which it had adopted in 1989, promised teachers "academic freedom," urged them to examine "controversial issues," and declared that students should be assigned materials with diverse viewpoints. Only if a teacher was in "doubt" as to whether a specific subject should be discussed was she required to consult with the principal or the superintendent-but there was no standard as to when the teacher should entertain such a doubt. R. 32-2, 7.

The district's specific policies on instructional materials declared that they were to be selected "by the appropriate professional personnel in consultation with the Superintendent, faculty and other sources as needed." But apart from the fact that the superintendent or board had to approve the purchase of such materials, nothing was said as to which professional personnel were the appropriate ones to select which particular categories of supplemental materials. R. 32-2, 16.

In practice, however, the district allowed teachers to select not only the various handouts that they used, but the supplemental books that they would assign—with the proviso that the district had to approve any purchases. Thus, in summer 2000, Evans-Marshall met with the other English teachers to select the supplementary texts that would be used in the 9th grade college-preparatory English class. They agreed that every 9th grade English teacher would assign Ray Bradbury's *Fahrenheit 451*, Sandra Cisneros's *The House on Mango Street*, and Harper Lee's *To Kill a Mockingbird*. They also agreed that each English teacher could select two additional books for use in his or her class. For books that had to be purchased, they submitted a request to the

department chair—who duly approved all of the requests. R. 31-1, 27-28.

For one of her supplemental texts, Evans-Marshall chose Herman Hesse's *Siddhartha* which the district had already purchased. Evans-Marshall was the only teacher to use that book and she found it in the school's bookroom where it had sat unused since 1985. With the full knowledge of the department chair—who enrolled her son in Evans-Marshall's class in 2000-2001—Evans-Marshall taught *Siddhartha* without incident in her first year of employment with the District. R. 36-1, 5, 16-17.

C. A vocal segment of local residents waged a public campaign against Evans-Marshall's assignment of classic works of fiction to her ninth-grade English class.

Trouble began, however, soon after the start of the fall semester in 2001. To illustrate the book-banning theme of *Fahrenheit 451*, Evans-Marshall asked her students to divide into groups, to pick books from the American Library Association's 1999-2000 list of most-challenged books, and to debate in class whether local officials in other areas of the country had acted properly when they banned that book from their schools or public libraries. Apx., 2a.

From the Association's list, which contains many of the classics of American literature, a group of Evans-Marshall's students selected *Heather has Two Mommies*. Apx., 2a. Even though the students had chosen the book—and were presumably going to obtain it from a bookstore or a public library—one parent complained to the principal about any use of that book. The principal told Evans-Marshall to change the assignment because "alternative families"

were "off limits." Apx., 2a-3a; R. 31-1, 26. Evans-Marshall was unhappy that an assignment about censorship had become an occasion for censorship and that one or a few parents had effectively vetoed the right of many students to choose to read and debate the book of their choice. But she complied with the principal's directive. R. 31-2, 30, 35.

The problem surfaced with far greater intensity when her class reached the *Siddhartha* assignment. Set in India at the time of Buddha, *Siddhartha* contains scenes that describe, in general terms, a sexual relationship outside of marriage and an embrace between two male friends. Evans-Marshall sent the book home with her students on October 22, 2001. That evening, 25 citizens appeared at the school board's meeting to object to the assignment of *Siddhartha* and to Evans-Marshall's earlier use of the Library Association's list of The 100 Most Challenged Books of 1999-2000. Apx., 3a.

In October and early November, the Superintendent publicly defended the use of *Siddhartha* and many of the books on the Library Association's list. R. 31-8. But in the school itself, the principal conveyed a different message. He hastily called a meeting of the English Department the day after the school-board's October meeting. He told the English teachers that Evans-Marshall was on the "hot seat" and "in trouble" because of her book-banning and *Siddhartha* assignments. Apx., 3a; R. 31-1, 17.

With the approval of the department chair, Evans-Marshall continued using *Siddhartha*. One student whose parents had objected to the use of *Siddhartha* was given an alternative assignment. R. 31-1, 8. That did not quell the protests, however. Apparently in response to appeals in some local churches, one

hundred persons-in a community with only 9,000 residents-unexpectedly appeared at the Board's November 26 meeting, bringing with them a petition for "decency" signed by 500 people. The local television stations and newspapers appeared to record the event. Apx., 3a-4a; R. 32-1, 5, 10, 15.

As revealed on the video tape of the meeting, the protestors' chief spokesperson turned in a list of objectionable quotations from *Siddhartha* and other books, including some in the junior high-school's library. R. 37-1.[2] A parent said the board should be "embarrassed" for assigning *Siddhartha* and complained about its alleged "sexual themes" and "explicit language." Apx., 3a. As the Superintendent later testified, even though the parents criticized other books on November 26, he understood that banning *Siddhartha* was the critical demand for the protestors who were parents of high-school students. R. 32-1, 16.

The Sixth Circuit claimed the November 26, 2001, meeting was not "one-sided." Apx., 4a. But if there were those who intended to speak in favor of free speech, they did so in terms which were barely recognizable. Two members of the school board did declare that there were differences of opinion and that they had to "walk the middle of the road to some extent." Apx., 4a. But the tape shows that neither the superintendent nor the board defended the use of *Siddhartha* on November 26. Instead, they said they wanted to work together with the protestors. The superintendent said the board was considering a policy requiring teachers to send a list of supplemen-

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[2] R. 37-1 is the DVD of the November 26, 2001 school board meeting. It is on file in the district court.

tal books home at the beginning of the new semester and banning the use of any book on a "controversial" subject unless the teacher signed and the administrator approved a statement on the compelling need for the use of that book. R. 32-1, 12; R. 37-1.

D. The Sixth Circuit properly concluded that there was evidence sufficient to prove that the Tipp City schools failed to renew Evans-Marshall's contract because of the content of her in-class speech.

Following the October and, especially, the November meeting, the principal conveyed increasingly threatening messages to Evans-Marshall. He told her that he did not want her to stop using *Siddhartha* because that would make it appear that the school district was admitting a mistake. But, he said he objected to her choice of the book because it "went against community standards" and "created a negative image in the community." He said that he did not like *Heather Has Two Mommies* or the "book banning debate." He also said that he "didn't like the choice of *Siddhartha*," did not like the discussions that "go along with those books," and that he intended to "rein it in." Apx., 4a-5a; R. 31-1, 5, 14, 17, 26.

At its December 17 meeting, the Board adopted its promised policy restricting the use of "controversial" books. R. 32-1, 36. The next day, the principal gave Evans-Marshall the first negative observation that she had ever received. It informed her that she needed approval from the department chair before using any material "containing graphic violence, sexual themes, profanity, suicide, drugs and alcohol..." Evans-Marshall responded in writing, declaring that

the books she had assigned, including *Siddhartha*, contained no such themes. R. 31-6, 6-7.

Just before the Christmas break, the dispute escalated once again. Evans-Marshall submitted a routine request to the school office for copies of two short works of fiction written by students in prior years that she planned to provide to students in her 11th-12th grade Creative Writing class who asked for examples of good student writing. R. 3101, 22. Of those two samples, one was a psychological sketch, written by a female student, portraying a young woman who was tormented by flashbacks of an earlier rape. R. 33-2, 1-4. The other was a short story, written by an Asian-American male student, portraying the destructive effects on the life of a fictional young Japanese-American man who carried out an order from the government of Japan to assassinate an American priest who had purportedly stood by while Japanese prisoners-of-war were executed. R. 33-2, 5-15.

The office clerical employee read those writing samples and showed them to the principal. He then called Evans-Marshall to his office. When she entered, he began waving the papers in his hand, yelling at her and demanding to know whether she intended to use those papers "after everything that has happened." Evans-Marshall told him that she would not use them if he objected. He did, and the papers were never distributed. Apx., 4a-5a.

The die was now cast. On January 2, the principal informed Evans-Marshall that he would "make life very difficult for the rest of the semester." When she asked if he objected to anything beyond the curricular disputes described above, he said that he would "...see what other issues I can come up with for your

evaluation next week." Apx., 5a. Eight days later, the principal made good on his threat. Of the 21 criteria on the district's standard evaluation form, he rated Evans-Marshall unsatisfactory in five categories. Almost all of his comments referred explicitly to Evans-Marshall's speech or disputes about that speech, including claims that Evans-Marshall's "use of material that is pushing the limits of community standards" had harmed the "image" of the school. Apx., 5a; R 31-5, p. 411, items 14 and 16.

Evans-Marshall filed a detailed response to the evaluation, including a point-by-point refutation of the few non-speech criticisms in the appraisal. R. 31-5, 38, 40, item 15 and comments. As Evans-Marshall later testified, the principal criticized Evans-Marshall's work for alleged deficiencies that he had never before mentioned. R. 31-1, 17, 35-36.

On March 21, 2002, the principal issued his final appraisal. It informed Evans-Marshall that her contract would not be renewed. The principal again rated her unsatisfactory "due to the use of some controversial material" and added complaints that she was not a "team player," had failed to accept "constructive criticism," and had engaged in "arguments" over district policies. R. 31-28, 4-6. Essentially all of the criticisms referred directly or indirectly to the curricular disputes set forth above.

Four days later, the superintendent submitted to the Board without modification the principal's non-renewal recommendation. R. 32-1, 24. It was the first and only time that the principal had recommended such a non-renewal. R. 32-1, 25. But the Board approved it without comment and sent Evans-Marshall a short letter stating, without reason, that her contract would not be renewed. R. 31-7.

When Evans-Marshall requested a statement of reasons, the Board responded with a letter in which the curricular issues suddenly disappeared and were replaced with claims of "problems with communication and teamwork." Apx., 5a-6a; R. 37-5. The Board's letter claimed that Evans-Marshall had communication difficulties with the department chair, which Evans-Marshall testified were "entirely fabricated." R. 31-1, 28. Indeed, the department chair specifically testified that she thought Evans-Marshall was an excellent teacher. R. 36-1, 22. The letter also claimed that Evans-Marshall had difficulties communicating with the principal, but Evans-Marshall testified that those were caused by the principal, who questioned her about "every little thing he could make an issue out of" and who was insulting, demeaning and rude to her on repeated occasions. R. 31-1, 29.

As permitted under Ohio law, Evans-Marshall requested a hearing before the school board. The Board held the hearing and then denied her appeal as soon as it was finished. It claimed that she had been fired because she "...failed to communicate appropriately with her principal and department chairpersons." R. 31-5.

The Sixth Circuit analyzed in detail the evidence set forth above and concluded as follows:

> To deny a causal relationship between Evans-Marshall's speech and the Board's actions does not come to grips with this sequence of events or with the imperative at this stage of the litigation that we draw all inferences in favor of the nonmoving party: the teacher. Evans-Marshall satisfies *Pickering* balancing and has shown that

her teaching choices caused the school board to fire her.

Apx., 13a.

E. The Sixth Circuit's reasons for concluding that *Garcetti* required that all in-class speech by teachers should be unprotected by the First Amendment.

Evans-Marshall filed suit alleging that the school district fired her in retaliation for the ideas expressed in the books and other materials that she used or proposed to use in her classroom.

The district court denied the school district's motion to dismiss, Apx. 105a, and on appeal, the Sixth Circuit affirmed on the basis of *Cockrel*. Apx., 84a-85a. Judge Sutton concurred but said the circuit should "rethink the way that it has applied *Connick* and *Pickering* to in-class curricular speech." Apx., 91a-92a.

Following remand, this Court decided *Garcetti*. When the defendants moved for summary judgment, the district court, after noting this Court's declaration that it was not deciding whether *Garcetti* applied to speech connected to "teaching" *or* "scholarship," stated that it would continue to apply *Cockrel* absent further guidance from either the Sixth Circuit or this Court. Apx., 41a-43a. The district court nevertheless granted the defendants' motion because it believed the facts did not show that Evans-Marshall had been fired because of protected speech. Apx., 60a-64a, 69a-70a.

On its second review of this case, the Sixth Circuit held, as noted, that all of Evans-Marshall's speech was on matters of public concern, that her interest in

that speech outweighed the school board's interest in suppressing it, and that she had produced sufficient evidence to support her claim that she had been fired because of that speech. Apx., 12a-13a. The Sixth Circuit then confronted the issue left open by *Garcetti*.

The panel began by declaring that the issue presented was whether a teacher had the right to choose the materials she used in her classes without interference from the school board. App., 1a-2a. But the Sixth Circuit then recognized that the school district had approved the use of *Siddhartha*, Apx., 3a, and that the petitioner had agreed, albeit under protest, not to discuss *Heather* or to distribute the two student papers described above. Apx., 2a, 4a-5a.

In any event, the Sixth Circuit's ruling went far beyond the question it posed at the outset of its opinion. It declared, without limitation, that "[I]n class curricular speech of teachers in primary and public schools" was unprotected by the First Amendment because it was made "'pursuant to [teachers'] official duties.'" Apx., 2a, citing, *Garcetti*, 547 U.S. at 421. It repeated that ruling on several occasions in its Opinion. Apx., 19a-20a.

The Court reasoned that *Garcetti* had to be so applied because the school board had the statutory power to set the curriculum and regulating teachers' in-class speech thus presented "...an accountability measure, pure and simple." Apx., 15a. The school district does not "regulate" a teacher's speech as much as it "hires that speech," and thus has the power to "regulate the content of what is or is not expressed in the classroom." Apx., 14a.

Such a sweeping rule, the Sixth Circuit declared, was justified not only by the statutory authority of the school board but by practical considerations as well. Recasting the actual facts of this case into a hypothetical case in which the school administration believed one book was better than another, the Circuit declared that recognizing constitutional rights for a teacher would turn "run-of-the-mine [sic.] curricular disputes into constitutional stalemates." Apx., 16a. Permitting the federal courts to resolve such disputes, the Court concluded, would result not only in "disenfranchising the 9,000 or so members of the Tipp City community," but would test the competence of the federal courts. Apx., 17a.

The Sixth Circuit then turned to *Garcetti's* recognition that there was "some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence." *Garcetti*, 547 U.S. at 425. The Sixth Circuit did not discuss the interests that the majority alluded to or the precedents that Justice Souter cited in his dissent. The Sixth Circuit simply declared that Evans-Marshall could not seek "refuge" in the reserved question in *Garcetti* because she did not teach at a public college or university and thus fell "outside the group the [*Garcetti*] *dissent* wished to protect." Apx., 21a (emphasis added). In any event, the Sixth Circuit concluded, even if academic freedom, as a constitutional rule, applied to teachers in secondary schools, it protected the educational institution, not the individual teacher. Apx., 22a.

The Sixth Circuit acknowledged that "...teachers, like students, do not 'shed their constitutional rights

to freedom of speech or expression at the schoolhouse gate." Apx., 14a, citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). But, it held, they do shed those rights when they pass through the classroom door. In its view, the First Amendment never "...warrant[s] judicial intrusion upon an educational institution's decisions [about in-class speech]." Apx. 18a-20a.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DEEPLY SPLIT OVER WHETHER TEACHERS' IN-CLASS SPEECH IS CATEGORICALLY UNPROTECTED BY THE FIRST AMENDMENT.

A. The First, Second, Fifth, Eighth, Tenth and Eleventh Circuits have held that teachers' in-class speech is, under defined standards, protected by the First Amendment.

There is a deep, longstanding split in the circuits on whether in-class speech by teachers is protected by the First Amendment and, if so, by what standard it is protected. Six circuits have ruled that certain in-class speech by teachers is protected by the First Amendment; four have held that it is categorically unprotected; and two have specifically reserved decision on the question, with one of those stating that it assumes that such speech is protected.

The First Circuit was the first to hold that in-class speech by a high-school teacher, including his selection and use of supplemental materials, was protected by the First Amendment. *Keefe v. Geankos*, 418 F.2d 359 (1st Cir. 1969). In reaffirming that decision twenty-four years later, the First Circuit

applied by analogy the standard that this Court had adopted to govern curricular speech by students. In-class speech by teachers could be restricted or punished, it said, only when those actions were "reasonably related to legitimate pedagogical concerns." *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993), citing *Hazelwood School District v. Kuhlmeir*, 484 U.S. 260, 273 (1988). The First Circuit added that the school district had to provide reasonable advance notice to teachers of speech that was prohibited because "few subjects lack controversy," and, if teachers "...must fear retaliation for every utterance, they will fear teaching." *Ward*, 996 F.2d at 453. *Accord. Conward v. Cambridge School Committee*, 171 F.3d 12, 23 (1st Cir. 1999).

The Second, Eighth, Tenth and Eleventh Circuits have all adopted the *Hazelwood* standard for protecting a teacher's in-class curricular speech. *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723-724 (2d Cir. 1994), *cert. den.*, 515 U.S. 1160 (1995); *Lacks v. Ferguson Reorganized Sch. Dist.*, 147 F.3d 718, 724 (8th Cir. 1998); *Miles v. Denver Public Schools*, 944 F.2d 773, 776-777 (10th Cir. 1991); *Virgil v. School Bd. of Columbia County Fla.*, 862 F.2d 1517 (11th Cir. 1989). *See also Holloman v. Harland*, 370 F.3d 1252, 1272 (11th Cir. 2004), adopting *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala.1970) (Johnson, J.).

The Fifth Circuit has also held teachers' in-class speech is protected, but it has not used the *Hazelwood* standard. In its first decision, the Fifth Circuit fashioned a balancing test of its own in holding that a school district had violated the First Amendment by terminating a probationary teacher for defying a principal's command to refrain from

discussing "blacks in American history." *Kingsville Independent School Dist. v. Cooper*, 611 F.2d 1109, 1110, 1112 (5th Cir. 1980).

Nine years later, the Fifth Circuit held that *Pickering* governed in-class speech by teachers. *Kirkland v. Northside Independent Sch. Dist.*, 890 F.2d 794, 799-800 (5th Cir. 1989), *cert. den.* 496 U.S. 926 (1990). But the Fifth Circuit added an important reservation: a teacher's use of an alternative reading list was not speech on a matter of "public concern" if the teacher had intentionally disregarded the district's procedures for authorizing the use of written materials in a classroom. *Id.*, at 800. The Fifth Circuit made clear, however, that the exception did not swallow the rule. Teachers, it said, were not required to "foster free debate in their classrooms only at their own risk" and districts may not "cast with a pall of orthodoxy" over their classrooms. *Id.*, at 801-802. *See also Chiras v. Miller*, 432 F.3d 606, 617 n. 29 (5th Cir. 2005) (in-class speech protected under *Pickering*).

Finally, the Ninth Circuit has adopted multiple standards for in-class speech, all of which extend some form of protection to that speech. Initially, it applied *Pickering*. *Nicholson v. Bd. of Educ. of Torrance Unified Sch. Dist.*, 682 F.2d 858, 865 (9th Cir. 1982). Later, it said that it had not decided whether in-class speech was protected but, it declared, school authorities could not "ambush" a community college teacher by discharging him without providing advance notice of what was prohibited. *Cohen v. San Bernadino Valley College*, 92 F.3d 968, 972 (9th Cir. 1996), *cert. den. sub. nom. Beeman v. Cohen*, 520 U.S. 1140 (1997).

Most recently, the Ninth Circuit, noting the split among the circuits, declared that it assumed that

curricular speech was governed by *Hazelwood* rather *Pickering*, although it said that it was not committed to either standard. *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1149 n. 6 (9th Cir. 2001).

B. The Third, Fourth, Seventh and, now, the Sixth Circuits have held that teachers' in-class speech is never protected by the First Amendment.

In 1998, the Fourth Circuit, sitting en banc, decided by a 7 to 6 majority that a school district could discipline a drama teacher for her selection of an award-winning play for use in a statewide competition because that play portrayed a dysfunctional, single-parent family with three children, one of whom was a lesbian and another of whom had an illegitimate child. Applying the *Pickering* test, the majority held that the school administration had the power to set the curriculum and that the teacher's selection of the play, even though accomplished through authorized procedures, was unprotected because such a decision was inherently not on a matter of "public concern." *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 368 (4th Cir. 1998), *cert. den.* 525 U.S. 813 (1998), citing *Kirkland*, *supra*.

The Third Circuit has also held that public universities' and public schools' control over the curriculum confers upon them an absolute power to direct teachers on the reading materials that they may use in their classes. *Edwards v. Calif. Univ. of Pa.*, 156 F.3d 488 (3rd Cir. 1998) (Alito, J.), *cert. den.* 525 U.S. 1143 (1999); *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172 (3rd Cir. 1990).

In 2007, the Seventh Circuit issued the most expansive decision to date by holding that a school district had absolute power not only over all written materials that were used but over every word a teacher said in the classroom. A district, it held, did not violate the First Amendment even if it fired a teacher for answering a student's question during a discussion of current events by stating that she had once honked her horn when she drove by an anti-war demonstration. *Mayer v. Monroe County Community School Corp*, 474 F.3d 477, 479 (7th Cir. 2007), *cert. den.* 552 U.S. 823 (2007).

The split is clear. Indeed, there is a cottage industry of law review articles expounding the split.[3] In the First, Second, Fifth, Eighth, Tenth, Eleventh, and, probably, the Ninth Circuits, Evans-Marshall could obtain relief on the facts she can establish. In the Third, Fourth, Sixth and Seventh Circuits, her complaint would be dismissed under Rule 12(b)(6).

As the First Amendment cannot have different meanings in the public schools of different states, this Court should settle the controversy and establish one standard to govern and protect in-class curricular speech by teachers in the Nation's public schools.

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[3] *See, e.g.*, Neal H. Hutchens, *"Silence at the Schoolhouse Gate: the Diminishing First Amendment Rights of Public School Employees,"* 97 Ky. L. J. 37 (2008-2009), Emily Gold Waldman, *"Returning to Hazelwood's Core. A New Approach to Restrictions on School Sponsored Speech,"* 60 Fla. L. Rev. 63 (Jan. 2008), Kevin G. Weiner, *"Locking Up the Marketplace of Ideas and Locking Out School Reform. Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools,"* 50 UCLA L. Rev. 959 (April 2003), Kimberly Gee, *"Establishing a Constitutional Standard That Protects Public School Teacher Classroom Expression,"* 38 J. L. & Educ. 409 (July 2009).

II. THIS CASE SQUARELY PRESENTS THE VITAL QUESTION, LEFT OPEN IN *GARCETTI*, OF WHETHER PUBLIC SCHOOL TEACHERS' IN-CLASS SPEECH IS CATEGORICALLY UNPROTECTED BY THE FIRST AMENDMENT.

A. The Sixth Circuit explicitly decided the issue left open by *Garcetti*.

In *Garcetti*, this Court held that the "...First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities." *Garcetti*, 547 U.S. at 424.

In dissent, Justice Souter, citing the example of a college professor's lectures, warned that this standard would cast of "a pall of orthodoxy over the classroom," in violation of this Court's historic precedents. *Id.*, at 438 (Souter, J., dissenting), citing *inter alia, Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *and Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Responding to Justice Souter, the *Garcetti* majority made clear that it left open the entire question of whether and how its holding applied to teaching or scholarship:

> Second, Justice Souter suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. *See post*, at 1969-1970. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we

> conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

Id., at 425.

The Sixth Circuit asserted that this reservation did not apply because high-school teachers did not typically engage in teaching *and* scholarship. Apx., 21a. The district court, however, rejected the same claim, noting that *Garcetti* stated it did not apply to those who engaged in teaching *or* scholarship. Apx., 41a.

Whether the Sixth Circuit answered a question that *Garcetti* explicitly left open—or resolved, as the Sixth Circuit claimed, an ambiguity in *Garcetti*—is, at this stage, irrelevant. In either event, the Sixth Circuit has answered a question left open by this Court—and a question that is of fundamental importance to public education itself.

B. The Sixth Circuit's decision will chill speech in the classrooms of the Nation and will allow school districts to impose orthodoxy in politics, nationalism, and other matters of opinion.

In *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), this Court declared that public education is today "the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."

It is teachers who carry out those vital tasks. They are charged with imparting a vast array of knowledge, skills and values to generations of students. In order to do so, they, unlike any other public employee, are regularly required to address the great, controversial issues raised by our history, our

politics, our economic system, our literature, our art, and our society.

According to the Sixth Circuit, they must address those issues with no constitutional protection at all. Indeed, as here, they may be fired if a sufficient number of constituents object to their use of a school-sanctioned classic of world literature, or if they give permission to their students to read and debate the banning of a classic children's book.

Our history and our culture are, of course, rich, diverse and exciting. But if teachers—including the increasing number of untenured teachers in our schools—must traverse that terrain without constitutional protection, their jobs become a mine field, in which they must guard against serious injury at every moment. Teachers would have to temper every discussion of a controversial issue, leading to mediocre classrooms where the "marketplace of ideas" would barely exist.

The Sixth Circuit's decision, however, poses a danger even greater than that. As many have warned, public education can become public indoctrination. And to ward off that danger, this Court established, almost seven decades ago, the following foundation for the modern constitutional law of public education:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

This Court has repeatedly described why teachers must be protected against laws that cast a pall of orthodoxy in the classroom. Teachers, Justice Frankfurter said, have the special task of "foster[ing] those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion." *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J, concurring). Scholarship, Chief Justice Warren said, "cannot flourish in an atmosphere of suspicion and mistrust," and therefore "teachers and students must always remain free to inquire, to study, and to evaluate." *Sweezy*, 354 U.S. at 250 (Warren, C.J). Summing up, this Court declared, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton*, 364 U.S. at 487 (1960) (Stewart, J.).

In the 1950s, those principles were sorely tested by those who declared that they wanted to prevent "subversive" teachers from "corrupting" the Nation's youth. Recognizing the danger that such an agenda posed for public education, this Court struck down a state's attempt to question a professor about his lectures, *Sweezy*, a state's attempt to compel teachers to disclose their associations, *Shelton*, and a state's' attempt to compel teachers and professors to profess their loyalty. *Wieman*. If none of those cases established a standard for protecting teachers' in-class speech, all are *premised* on the idea that protecting such speech is absolutely vital.

Our schools, the Court declared, cannot be "enclaves of totalitarianism." *Tinker*, 393 U.S. at 506, 512. Our courts, the Court declared, must not tolerate laws that cast a "pall of orthodoxy" over the classrooms:

> 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' [*Shelton, supra*, 364 U.S. at 487]. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'

Keyishian, 385 U.S. at 603.

In leaving open whether *Garcetti* applied to teachers, this Court essentially asked the lower courts to determine whether the constitutional interests outlined above required a different rule for those engaged in "scholarship or classroom instruction." The Sixth Circuit did not attempt that task. It barely mentioned this Court's great decisions or the policies on which they were based. Indeed, it could not, for the mere recitation of the precedents set forth above makes clear the error that the Sixth Circuit has committed—and the tremendous importance of that error.

Nothing would cast a pall of orthodoxy over the Nation's classrooms more surely than declaring that *all* in-class speech by teachers is categorically unprotected. School districts could then openly fire teachers *because* they stated unpopular ideas, revealed inconvenient facts, or asked questions that were too searching. Indeed, once citizens knew that was the law, they would increasingly demand firing or discipline of teachers who made, or were claimed to have made, statements that offended those citizens' views as to what was proper in politics, nationalism, religion or other matters of opinion.

The facts of this case illustrate the carnage that such a rule of law would wreak. According to the Sixth Circuit, Evans Marshall can prove that she was fired for using a school-approved novel that acknowledged that sex existed outside marriage and for proposing to use a children's book that acknowledged that there were lesbians among the Nation's parents.

Ninth-grade students—that is, 15 year olds—have, however, almost attained the age at which they have a *constitutional* right to *engage* in the sexual conduct that those books acknowledge. *See Lawrence v. Texas*, 539 U.S. 558 (2003). If a teacher may be fired with no constitutional recourse for using, or proposing to use, books that describe conduct that is constitutionally protected, then any teacher may be fired for teaching what school officials or their constituents later determine should be "off limits."

Indeed, the rule proclaimed by the Sixth and Seventh Circuits poses a still greater danger. A school board, the Seventh Circuit held, may require its teachers not only to inform their students who Benedict Arnold was, but to inform them that he was a traitor. *Mayer*, 474 F.3d at 479. As Benedict Arnold has few defenders, that may seem unobjectionable. But substitute Jefferson Davis and the dangers are apparent. If speech by teachers is categorically unprotected, a school board may require its teachers to "inform" their students that Davis was the best friend of his slaves and that he took up arms only in order to oppose a cruel army that had invaded his native land.

We cannot say that will not happen—because it has happened.

Indeed, its echoes have already occurred in Arizona's statute declaring that school districts will

not be fully funded if teachers in "Latina/o studies" classes make statements or use books that conflict with the political opinions that the State has declared must be adhered to. *See* Ariz. Rev. Stat. § 15-112.

This Court decided *Barnette* when great catastrophes had already occurred. The Court's answer to those catastrophes was simple: our Constitution, it said, was "designed to avoid these ends by avoiding these beginnings." *Barnette*, 319 U.S. at 641. Of course, judicial decisions, including courageous ones, cannot stop catastrophes by themselves. But stopping the legal beginnings may aid in stopping the catastrophes and the Sixth Circuit's decision in this case is precisely the type of beginning that this Court should end.

If allowed to stand, the Sixth Circuit's decision will deeply damage public education by guaranteeing mediocrity, by silencing dissent, and by opening the way to places where we should never again go. The Court should stop this now by reversing the Sixth Circuit's claim that teachers' in-class speech is categorically unprotected.

C. Unwarranted fear of teachers and of judicial enforcement of Constitutional rights led the Sixth Circuit to base its decision on principles that this Court has definitively rejected.

The Sixth Circuit essentially declared that the district that pays a teacher's salary has total control over what that teacher may and, indeed, must say:

> When a teacher teaches, "the school system does not 'regulate' [that] speech as much as it *hires* that speech... [citation omitted]. And if it is the

> school board that hires that speech, it surely can "regulate the content of what is or what is not expressed." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).

Evans-Marshall, Apx., 14a (emphasis in original).

The Sixth Circuit's decision is absolutely identical to the rule of law that the Tennessee Supreme Court proclaimed in affirming the conviction of John Scopes:

> The plaintiff in error was a teacher in the public schools of Rhea County.... He had no right or privilege to serve the state except upon such terms as the state prescribed.

State v. Scopes, 1 Smith (TN) 105, 289 S.W. 363 (1927).

This Court's decisions in *Epperson* and *Aguillard* prevent a simple repetition of the Scopes Monkey Trial. *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Edwards v. Aguillard*, 482 U.S. 578 (1987). But the Sixth Circuit's rule invites new Monkey Trials when local school boards terminate teachers for teaching scientific facts that contradict what some believe is revealed truth.

Nothing in *Rosenberger* sanctions such a result. In that case, the Court "...did not question the right of the University to make academic judgments as to how best allocate scarce resources," including content-based decisions on what should be taught. *Rosenberger*, 515 U.S. at 833, citing *Widmar v. Vincent*, 454 U.S. 362, 276 (1983). But if the state unquestionably *has* the power to decide that it cannot afford to teach Arabic but must find the money to teach American history, it unquestionably *lacks* the

power to decide that Arabic should not be taught because it is the language of "our enemies" or to require that history only be taught with all criticisms of American foreign policy expunged from the record.

The Sixth Circuit derives its rule not from this Court's precedents, but from two concerns that it finds to be overriding. First, it declares, teachers have no right to use their classroom as a "platform" for proclaiming their preferred views. Apx., at 15a. Second, it declares, judicial intervention to protect curricular speech is, in all cases, a "recipe for disenfranchising" the local citizens as well as for testing the competence of the federal courts themselves. Apx., at 17a-18a.

The first point echoes the concerns that this Court addressed in the 1950s by asserting that teachers could corrupt the Nation's youth. But then, as now, the concern that teachers may abuse their power by teaching *outside* the curriculum does not justify discharging them when they express dissenting ideas on subjects *inside* the curriculum.

More fundamentally, ending the possibility that *some* teachers may abuse their right of free speech by eliminating free speech for *all* teachers is a cure that is infinitely worse than the disease to which it is addressed. "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds," this Court once held, only at the price of "occasional eccentricity and abnormal attitudes." *Barnette*, 319 U.S. at 641-642. What was true then is true now.

The Sixth Circuit's second point—its concern over judicial usurpation of local, democratic control—has also been addressed by this Court before. Of course,

the federal courts should not "intervene in the resolution of conflicts which arise in the daily operation of school systems" *unless* those disputes "directly and sharply implicate basic constitutional values." *Epperson*, 393 U.S. at 104. But where such basic values *are* implicated, the federal courts must not fail to "...to safeguard the fundamental values of freedom of speech and inquiry and of belief." *Id.*

In the end, the Sixth Circuit's *Scopes*-like rule abandons those principles in favor of complete local control over what may be said in the classroom. The Seventh Circuit, however, correctly recognized, that "Majority rule about what subjects and viewpoints will be expressed in the classroom has the potential to turn into indoctrination," because "elected school boards are tempted to support majority positions about religious or patriotic subjects especially." *Mayer*, 474 F.3d at 479. But having recognized the danger, the Seventh Circuit then held that local elections were the only defense against that danger:

> But if indoctrination is likely, the power should be reposed in someone the people can vote out of office, rather than tenured teachers. At least the board's views can be debated openly, and the people may choose to elect persons committed to neutrality on contentious issues.

Mayer, 474 F.3d at 479-480.

But if local elections—*along with tenure*—are, undoubtedly, a vital line of defense for democratic rights in public education, those elections cannot be the *sole* line of defense. In many universities and in an increasing number of public schools, such elections do not exist because the schools are controlled by political appointees, financial managers, or private

charter companies. Even where democratic control does exist, it may take years before new elections can throw out officials who have attempted to establish some form of state-enforced orthodoxy. By that time, the damage to teachers and, especially, students may be irreparable. Finally, and most ominously, our history tells us that where the established orthodoxy supports a dominant racial or ethnic group, the offending officials may not be thrown out for decades—during which time generations of students and the Nation as a whole will have suffered historic harm.

The Sixth Circuit fundamentally erred by declaring that judicial intervention always and everywhere contradicts democratic control. Tipp City's school board elections are *not* the only expression of democracy at issue. On occasions too numerous to cite, this Court has held that the Constitution and the amendments to it are the supreme expression of American democracy—and that each part of the Nation, including the local school boards, are governed by *that* democracy. *Barnette* expresses the well-known rule that the Sixth Circuit ignored:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Id., at 638.

With no discernible ill effects, the majority of circuits in the country—including, until this decision,

the Sixth Circuit—have long enforced *Barnette's* democratic principles by protecting in-class curricular speech under either the *Pickering* or the *Hazelwood* standard. On the facts present here, the Sixth Circuit twice held the petitioner met the *Pickering* standard—and she clearly met the *Hazelwood* standard as well.

But her speech is protected even under the narrowest standard that this Court has applied. In *Pico*, where the issues were clouded, as they are not here, by claims of profanity and the asserted lack of literary merit in the books at issue, the Justices of this Court "cheerfully" agreed that books may not be removed from school libraries and, presumably, classrooms, because the ideas in them offend the beliefs of those in power or because their subjects or their authors come from a disfavored race or group. *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 870-871 (1982) (Brennan, J., plurality opinion). *See also Id.* at 879 (Blackmun, J, concurring), and *Id.*, at 907 (Rehnquist, J., dissenting). Even when discussing the funding power, this Court has adhered to that standard. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998).

Evans-Marshall easily meets that standard as well. She fails to state a claim only if, as the Sixth Circuit held, all in-class speech by teachers is categorically unprotected. That rule, however, means that our teachers and students *will* shed their constitutional rights at the classroom door; that our classrooms will no longer be the "marketplace of ideas; and that the ban on state-enforced orthodoxy—*Barnette's* "fixed star"—will fall from our sky.

We cannot out-innovate the world if we ban challenging ideas and innovative teachers from our classrooms. This Court should grant the writ because the Sixth Circuit's rule of law violates our most fundamental principles and threatens to kill the democratic spirit that has been the lifeblood of our best schools for many generations.

CONCLUSION

For the reasons stated, the petitioner Shelley Evans-Marshall requests that this Court grant the writ of certiorari to review and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT

No. 09-3775

SHELLEY EVANS-MARSHALL,
Plaintiff-Appellant,

v.

BOARD OF EDUCATION OF THE TIPP CITY EXEMPTED VILLAGE SCHOOL DISTRICT; CHARLES W. WRAY; JOHN T. ZIGLER,
Defendants-Appellees.

Oct. 21, 2010.

Rehearing and Rehearing En Banc
Denied Jan. 25, 2011.

Before: SILER and SUTTON, Circuit Judges; CLELAND, District Judge.*

OPINION

SUTTON, Circuit Judge.

Does a public high school teacher have a First (and Fourteenth) Amendment right "to select books and methods of instruction for use in the classroom with-

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* The Honorable Robert H. Cleland, United States District Judge for the Eastern District of Michigan, sitting by designation.

out interference from public officials"? Yes, says the teacher, Shelley Evans-Marshall. No, says the Tipp City Board of Education. Because the right to free speech protected by the First Amendment does not extend to the in-class curricular speech of teachers in primary and secondary schools made "pursuant to" their official duties, *Garcetti v. Ceballos*, 547 U.S. 410, 421, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), we affirm the judgment rejecting this claim as a matter of law.

I.

In 2000, the Tipp City Board of Education hired Evans-Marshall to teach English and to supervise Tippecanoe High School's literary magazine, BirchBark, for the 2000-2001 school year. The Board renewed her contract for the 2001-2002 school year, when Evans-Marshall taught English to 9th and 11th grade students and a creative writing course to 11th and 12th grade students. At the beginning of the fall semester, Evans-Marshall assigned Ray Bradbury's *Fahrenheit 451* to her 9th graders. To the end of exploring the book's theme of government censorship, she distributed a list compiled by the American Library Association of the "100 Most Frequently Challenged Books." Students divided into groups, and Evans-Marshall asked each group to pick a book from the list, to investigate the reasons why the book was challenged and to lead an in-class debate about the book. Two groups chose *Heather Has Two Mommies* by Lesléa Newman.

A parent complained about *Heather Has Two Mommies*, and the principal, Charles Wray, asked Evans-Marshall to tell the students to choose a different book. She complied, explaining to her class that "they were in a unique position to . . . use

this experience as source material for their debate because they were in the . . . position of having actually experienced censorship in preparing to debate censorship." R.31-2 at 342-43. After the class completed the *Fahrenheit 451* unit, Evans-Marshall assigned *Siddhartha* by Hermann Hesse and used it as the basis for in-class discussions about "spirituality, Buddhism, romantic relationships, personal growth, [and] familial relationships." R.31-1 at 101.

At the October 2001 meeting of the school board, twenty-five or so parents complained about the curricular choices in the schools, including *Siddhartha* and the book-censorship assignment. The next day, Principal Wray called a meeting of the English department and told Evans-Marshall that she was "on the hot seat." R.31-1 at 64. Nearly 100 parents, as well as the local news media, attended the board's November meeting. For over an hour, parents expressed concerns about books in the curriculum and in the school libraries. While the parents mentioned many books, they raised particular objections to the materials in Evans-Marshall's classroom and her teaching methods. Superintendent John Zigler explained that the school board had purchased many of the materials, including Siddhartha, several years before, making it difficult to criticize Evans-Marshall for teaching a book the school board had bought. "You should be embarrassed," one parent responded, referring to the explicit language and sexual themes in the book. R.46 at 1:32:20. Another parent complained that she had asked for an alternative assignment—instead of *Siddhartha*—and "was given three books," two of which "were for a four-to-eight year old." R.46 at 1:33:40. "I'm not going to put my daughter through this," the parent added, explaining that she thought Evans-Marshall was

"punish[ing] my daughter." R.46 at 1:33:40. A group of parents presented the board with a 500-signature petition calling for "decency and excellence" in the classroom. R.46 at 0:29:00, 0:55:00.

The meeting was not one-sided. A member of the board—a parent himself—warned that the school district's policies about potentially objectionable material "have to be well thought out because what you might find offensive, I might not." R.46 at 1:41:40. Another board member reminded the group that, as elected officials, the board "must walk the middle of the road to some extent," even if the community might "err . . . on the conservative side." R.46 at 0:20:45. And a parent who made a formal statement said that he "[did not] condone" the behavior of some of the more vocal parents and trusted that school officials "want what's best for our kids." R.46 at 0:22:00.

The matter did not end there. In teaching creative writing, Evans-Marshall maintained a file of student writing samples that she shared with students who asked for additional guidance on assignments. Running low on copies of some of the samples, she sent three of them to support staff to be copied. A member of the copy room staff, apparently not a friend, showed the writing samples to Wray, saying he "ought to read this." R.33-1 at 76. After reading the papers, Wray called Evans-Marshall to his office. When she arrived, he waved two of the writing samples in his hand, one a first-hand account of a rape, the other a story about a young boy who murdered a priest and desecrated a church. "[A]re you going to use these in class after everything that's happened?" he shouted. R.31-1 at 84. Evans-Marshall explained that the writing samples were not intended for in-class distribution and that she would refrain

from sharing the papers if he wanted. Wray said that he did not like the materials she was using in her classroom or the themes of her in-class discussions and that he "intended to rei[n] it in." R.41 at 24-25.

The two soon had another argument in the school library about Evans-Marshall's plans to give a final exam involving group discussions and student self-evaluations. Evans-Marshall asked Wray to give her a model exam so she could "give [him] back exactly what [he] want[ed]," R.31-1 at 43, prompting Wray to call her a "smart a-," *id.* at 41-42. The next day, Evans-Marshall complained to Superintendent Zigler about Wray's behavior. Zigler told her to meet with Wray after the semester break to work things out and offered to speak with Wray in the meantime. He also said that she should feel free to file a formal grievance if things had not been worked out by January.

Things did not work out by January. Wray and Evans-Marshall talked, but they fell back into the same channels of disagreement. Evans-Marshall asked whether there was anything aside from her curricular decisions that bothered Wray. "I'll see what other issues I can come up with," Wray responded, "for your evaluation next week." R.31-1 at 52-53. Wray's evaluations criticized Evans-Marshall's attitude and demeanor as well as her "[u]se of material that is pushing the limits of community standards." R.31-5 at 38-39. Evans-Marshall filed written objections to Wray's evaluations and a grievance with Superintendent Zigler.

At its March 2002 meeting, the school board voted unanimously not to renew Evans-Marshall's contract. She requested an explanation, and the school board sent her a letter on April 9, 2002, saying that her

non-renewal was "due to problems with communication and teamwork." R.31-6 at 10. At Evans-Marshall's request, the board held a formal hearing about the employment decision. Principal Wray, Superintendent Zigler and Evans-Marshall all testified, and the board again voted unanimously not to renew her contract.

(The alert reader may notice that some of the factual allegations raised in Evans-Marshall's complaint and addressed in our first decision do not appear here. *See Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 226-27 (6th Cir.2005) (*Evans-Marshall I*). The distinction between a Civil Rule 12(b)(6) and a Civil Rule 56 appeal explains the difference. As is often the case, discovery will confirm the accuracy of some allegations and disprove others. We recount today only the allegations in the complaint backed up by "the pleadings, the discovery and disclosure materials on file, and any affidavits." Fed.R.Civ.P. 56(c)(2).)

In March 2003, Evans-Marshall filed this § 1983 action against the school board, Wray and Zigler. She alleged that the school board and other defendants had retaliated against her "curricular and pedagogical choices," infringing her First Amendment right "to select books and methods of instruction for use in the classroom without interference from public officials." R.1 ¶¶ 32, 36. The defendants moved to dismiss the complaint for failure to state a claim under Civil Rule 12(b)(6), but the district court held that Evans-Marshall had sufficiently alleged a First Amendment violation. We affirmed. *Evans-Marshall I*, 428 F.3d 223.

After discovery by both sides, the defendants again moved for summary judgment, arguing that the Supreme Court's intervening decision in *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), and the unrebutted facts gleaned from discovery foreclosed Evans-Marshall's claim. In the alternative, they sought summary judgment on the ground that the school board should prevail under the balancing test announced in *Pickering v. Board of Education*, 391 U.S. 563, 572-73, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), or that there was no causal link between Evans-Marshall's curricular choices and the non-renewal of her contract. The district court granted the defendants' summary judgment motion. It declined to apply *Garcetti* to the dispute and held that Evans-Marshall's teaching methods and curricular choices survived the *Pickering* balancing test. But it concluded that she had not provided sufficient evidence "link[ing] her teaching" methods and curricular choices to "the Board's decision to not renew her contract." R.52 at 47.

II.

This free-speech-retaliation case implicates two competing intuitions. On the one side, doesn't a teacher have the First Amendment right to choose her own reading assignments, decide how they should be taught and above all be able to teach a unit on censorship without being censored or otherwise retaliated against? On the other side, doesn't a school board have the final say over what is taught, and how, in the public schools for which it is responsible? Who wins depends on which line of legal authority controls.

A.

In free-speech retaliation cases arising in the employment context, we ask three questions: Was the individual involved in "constitutionally protected" activity-here activity protected by the free speech clause of the First Amendment? *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Would the employer's conduct discourage individuals of "ordinary firmness" from continuing to do what they were doing? *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir.1998); *see Bart v. Telford*, 677 F.2d 622, 625 (7th Cir.1982). Was the employee's exercise of constitutionally protected rights "a motivating factor" behind the employer's conduct? *Mt. Healthy*, 429 U.S. at 287, 97 S.Ct. 568. The claimant must win each point to prevail.

The first question requires some elaboration. Three Supreme Court cases define the contours of the free-speech rights of public employees.

The "matters of public concern" requirement. The First Amendment protects the speech of employees only when it involves "matters of public concern." *Connick v. Myers*, 461 U.S. 138, 143, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). In *Connick*, an assistant district attorney, after learning that her supervisor planned to transfer her, solicited information from her colleagues about the office's transfer policy, about office morale and about whether supervisors had pressured anyone to participate in political campaigning. *Id.* at 141, 103 S.Ct. 1684. When the supervisor fired her for refusing to accept the transfer, she sued, alleging retaliation against protected speech, namely her initiation of the survey. *Id.* In rejecting her claim, the Court explained that not all employee speech is protected, only speech that "fairly

[may be] considered as relating to" issues "of political, social, or other concern to the community." *Id.* at 146, 103 S.Ct. 1684. When, by contrast, an employee's speech does not relate to a matter of public concern, public officials enjoy "wide latitude" in responding to it without "intrusive oversight by the judiciary in the name of the First Amendment." *Id.*

The *"balancing" requirement.* If the employee establishes that her speech touches "matters of public concern," a balancing test determines whether the employee or the employer wins. *See Pickering*, 391 U.S. at 568, 88 S.Ct. 1731. In *Pickering*, the Court considered the claim of a high school teacher whom the principal fired after the teacher wrote a letter to the local newspaper, criticizing the school board's budgetary decisions. *Id.* at 564, 88 S.Ct. 1731. In resolving the claim, the Court "balance[d] . . . the interests of the teacher, as a citizen, in commenting upon matters of public concern" against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568, 88 S.Ct. 1731. Reasoning that there was no relationship between the contents of the letter and the "proper performance of [the teacher's] daily duties in the classroom," the Court ruled for the teacher, concluding that the school board's interests did not outweigh his desire to "contribute to public debate" like any other citizen. *Id.* at 572-73, 88 S.Ct. 1731.

The *"pursuant to" requirement.* In the last case in the trilogy, a prosecutor reviewed a private complaint that a police officer's affidavit used to obtain a search warrant contained several misrepresentations. *Garcetti*, 547 U.S. at 413-14, 126 S.Ct. 1951. After confirming that the affidavit contained serious

falsehoods, the prosecutor wrote a memo to his superiors about his findings, recommended that the office dismiss the case and eventually testified to the same effect at a hearing to suppress the evidence discovered during the search. *Id.* at 414-15, 126 S.Ct. 1951. In the aftermath of these and other actions, the prosecutor claimed that the office retaliated against him by transferring him to another courthouse and by denying him a promotion. *Id.* at 415, 126 S.Ct. 1951. In rejecting his free-speech claim, the Court did not deny that the prosecutor's speech related to a matter of "public concern" under *Connick*, and it did not take on the lower court's reasoning that *Pickering* balancing favored the employee. It instead concluded that the First Amendment did not apply. "The controlling factor," the Court reasoned, "is that his expressions were made *pursuant to* his duties as a calendar deputy," making the relevant speaker the government entity, not the individual. *Id.* at 421, 126 S.Ct. 1951 (emphasis added). "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.*

B.

A First Amendment claimant must satisfy each of these requirements: the *Connick* "matter of public concern" requirement, the *Pickering* "balancing" requirement and the *Garcetti* "pursuant to" requirement. Evans-Marshall clears the first two of these hurdles but not the third

The content of Evans-Marshall's speech "relat[ed] to . . . matter[s] of political, social, or other concern to the community." *Connick*, 461 U.S. at 146, 103 S.Ct. 1684. A teacher's curricular speech, we have said on several occasions, ordinarily covers these matters. *See Evans-Marshall I*, 428 F.3d at 230-31; *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1052 (6th Cir.2001); *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir.2001). "[T]he essence of a teacher's role is to prepare students for their place in society as responsible citizens," *Hardy*, 260 F.3d at 679, and the teacher that can do that *without* covering topics of public concern is rare indeed, perhaps non-existent. Look no further than the November 2001 meeting of the school board to confirm the point. Members of the community had a lot to say about the topics discussed in Evans-Marshall's class, and they went to the school board meeting to say it. That large segments of the community disagreed with Evans-Marshall's speech-her class assignments and teaching methods-is beside the point. The question is whether the topics discussed are "of . . . concern" to the community, *Connick*, 461 U.S. at 146, 103 S.Ct. 1684, not whether the community approved of the teacher's position on each topic. On this summary-judgment record, Evans-Marshall's curricular speech passes the *Connick* "matter of public concern" test, as the district court correctly determined.

Evans-Marshall also satisfies *Pickering* "balancing"-that her "interests . . . as a citizen, in commenting upon matters of public concern" through her in-class speech outweighed the school board's "interest . . . as an employer, in promoting the efficiency of the public services it performs." *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731. As the district court correctly concluded, a legitimate factual dispute exists over

whether Evans-Marshall's interest in teaching Siddhartha (and in making other curricular choices) overshadowed any interest the school board might claim in disciplining her for doing so. Although the school board has "the ability to select and require adherence to a . . . stated curriculum," R.52 at 26, the court concluded, its interest in enforcing curricular standards is severely undermined if it disciplines a teacher for teaching a book the board "had purchased . . . and made . . . available to teachers as an optional text," *id.* at 40-41. And although the court did not find Evans-Marshall's interest in "select[ing] materials to supplement the Board-chosen textbooks . . . and the methods for teaching" to be compelling, *id.* at 32, that interest outweighed the school's near-zero interest in disciplining her for teaching a book it had purchased, *id.* at 41. We agree-for many of the same reasons identified in *Evans-Marshall I*. *See* 428 F.3d at 231-32.

After addressing the *Pickering* point, however, the district court concluded that Evans-Marshall stumbled over causation. The court did not believe that Evans-Marshall could show that her exercise of free speech rights was "a motivating factor" behind the school board's conduct. *See Mt. Healthy*, 429 U.S. at 287, 97 S.Ct. 568. That is a harder point to sell. And a brief accounting of the evidence and the chronology of events shows why.

Before any parents complained about her reading assignments and classroom discussions, Evans-Marshall had never received a negative performance review. Dozens of parents flooded the school board's November 2001 meeting, and many complained about Evans-Marshall's teaching. One parent told the school board that it "should be embarrassed" about

the book she was teaching. R.46 at 1:32:20. Principal Wray thereafter told Evans-Marshall that she would have to clear any potentially controversial material with him. He later told Evans-Marshall that he "intended to rei[n] . . . in" her classroom discussions. R.41 at 24-25. In December 2001, Evans-Marshall complained to Superintendent Zigler about Wray's behavior. And when the semester resumed in January 2002, Wray told Evans-Marshall that he would "see what . . . [he could] come up with for [her] evaluations," R.31-1 at 52-53, after which he gave her negative performance reviews for the first time. Only a short time later, the board voted not to renew her contract. To deny a causal relationship between Evans-Marshall's speech and the Board's actions does not come to grips with this sequence of events or with the imperative at this stage of the litigation that we draw all inferences in favor of the non-moving party: the teacher. Evans-Marshall satisfies *Pickering* balancing and has shown that her teaching choices caused the school board to fire her.

Evans-Marshall, however, cannot overcome *Garcetti*. When government employees speak "pursuant to their official duties," *Garcetti* teaches that they are "not speaking as citizens for First Amendment purposes." 547 U.S. at 421, 126 S.Ct. 1951. Any dispute over the board's motivations, Pickering balancing or the "public concerns" of her speech under *Connick* is beside the point if, as Evans-Marshall does not dispute, she made her curricular and pedagogical choices in connection with her official duties as a teacher.

In the light cast by *Garcetti*, it is clear that the First Amendment does not generally "insulate" Evans-Marshall "from employer discipline," *Garcetti*, 547 U.S. at 421, 126 S.Ct. 1951, even discipline prompted by her curricular and pedagogical choices and even if it otherwise appears (at least on summary judgment) that the school administrators treated her shabbily. When a teacher teaches, "the school system does not 'regulate' [that] speech as much as it *hires* that speech. Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary." *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir.2007). And if it is the school board that hires that speech, it can surely "regulate the content of what is or is not expressed," *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), what is expressed in other words on its behalf. Only the school board has ultimate responsibility for what goes on in the classroom, legitimately giving it a say over what teachers may (or may not) teach in the classroom.

It is true that teachers, like students, do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). But that does not transform them into the employee *and* employer when it comes to deciding what, when and how English is taught to fifteen-year-old students. Consider the difference between the speech of Evans-Marshall and Marvin Pickering, teachers both. When Pickering sent a letter to the local newspaper criticizing the school board, he said something that any citizen has a right to say, and he did it on his own time and in his own name, not on the school's time or

in its name. Yet when Evans-Marshall taught 9th grade English, she did something she was hired (and paid) to do, something she could not have done but for the Board's decision to hire her as a public school teacher. As with any other individual in the community, she had no more free-speech right to dictate the school's curriculum than she had to obtain a platform-a teaching position-in the first instance for communicating her preferred list of books and teaching methods. "[N]o relevant analogue" exists between her in-class curricular speech and speech by private citizens. *Garcetti*, 547 U.S. at 424, 126 S.Ct. 1951.

Teachers are not everyday citizens, Evans-Marshall insists, and they have a right "to select books and methods of instruction for use in the classroom without interference from public officials." R.1 ¶ 32. But that is not what Ohio law provides or the First Amendment requires. Start with Ohio law. Under it, "[t]he board of education of each city . . . shall prescribe a curriculum." O.R.C. § 3313.60(A). State law gives elected officials—the school board—not teachers, not the chair of a department, not the principal, not even the superintendent, responsibility over the curriculum. This is an accountability measure, pure and simple, one that ensures the citizens of a community have a say over a matter of considerable importance to many of them—their children's education—by giving them control over membership on the board.

The First Amendment does not ban this policy choice or this accountability measure. The Constitution does not prohibit a State from creating elected school boards and from placing responsibility for the curriculum of each school district in the hands of

each board. Teachers no doubt are "required . . . to speak or write" and otherwise express themselves, *Garcetti*, 547 U.S. at 422, 126 S.Ct. 1951, but this does not make them "sovereign[s] unto [themselves]," *Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir.1989). "The curricular choices of the schools should be presumptively their own-the fact that such choices arouse deep feelings argues strongly for democratic means of reaching them." *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 371-72 (4th Cir.1998) (en banc) (Wilkinson, C.J., concurring).

How at any rate would a contrary approach work? If one teacher, Evans-Marshall, has a First Amendment right "to select books and methods of instruction for use in the classroom," R.1 ¶ 32, so presumably do other teachers. Evans-Marshall may wish to teach *Siddhartha* in the first unit of the school year in a certain way, but the chair of the English department may wish to use the limited time in a school year to teach *A Tale of Two Cities* at that stage of the year. Maybe the head of the upper school has something else in mind. When educators disagree over what should be assigned, as is surely bound to happen if each of them has a First Amendment right to influence the curriculum, whose free-speech rights win? Why indeed doesn't the principal, Wray, have a right to defend the discharge on the ground that he was merely exercising his First Amendment rights in rejecting Evans-Marshall's curricular choices and methods of teaching? Placing the First Amendment's stamp of approval on these kinds of debates not only would "demand permanent judicial intervention in the conduct of governmental operations," *Garcetti*, 547 U.S. at 423, 126 S.Ct. 1951, but it also would transform run-of-the-mine curricular disputes into constitutional stalemates.

That is not the only problem. What employer discipline arising from an employee's manner of teaching-choices of books and the methods of teaching them-does not implicate speech? Could a teacher respond to a principal's insistence that she discuss certain materials by claiming that it improperly *compels* speech? *Cf. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). Could a teacher continue to assign materials that members of the community perceive as racially insensitive even after the principal tells her not to? Could a teacher raise a controversial topic (say, the virtues of one theory of government over another or the virtues of intelligent design) after a principal has told her not to? Could a teacher introduce mature sexual themes to fifteen year olds when discussing a work of literature after a principal has told her not to? And "[d]oes a music teacher retain veto power over that most controversial of school productions-the Holiday Concert?" *Evans-Marshall I*, 428 F.3d at 237-38 (Sutton, J., concurring).

Because "one man's vulgarity is another's lyric," *Cohen v. California*, 403 U.S. 15, 25, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), or, as one school board member put the point at the November 2001 meeting, "what you might find offensive, I might not," R.46 at 1:41:40, parents long have demanded that school boards control the curriculum and the ways of teaching it to their impressionable children. Permitting federal courts to distinguish classroom vulgarities from lyrics or to pick sides on how to teach *Siddhartha* not only is a recipe for disenfranchising the 9,000 or so members of the Tipp City community but also tests judicial competence. "If even the most happily married parents cannot agree on what and how their own children should be taught, as [we]

suspect is not infrequently the case, what leads anyone to think the federal judiciary can answer these questions?" *Evans-Marshall I*, 428 F.3d at 237-38 (Sutton, J., concurring).

The key insight of *Garcetti* is that the First Amendment has nothing to say about these kinds of decisions. An employee does not lose "any liberties the employee might have enjoyed as a private citizen" by signing on to work for the government, but by the same token, the government, just like a private employer, retains "control over what the employer itself has commissioned or created": the employee's job. *Garcetti*, 547 U.S. at 422, 126 S.Ct. 1951. And that insight has particular resonance in the context of public education. Every child in Ohio must attend school, *see* O.R.C. § 3321.02, providing public school teachers with a captive audience for their in-class speech, *see Mayer*, 474 F.3d at 479, and providing a compelling reason for putting curricular choices in the hands of "someone [they] can vote out of office," id. at 479-80, or who is otherwise democratically accountable, *see* O.R.C. § 3311.71 (elected officials and other community institutions appoint school board members in certain municipal school districts).

In concluding that the First Amendment does not protect primary and secondary school teachers' in-class curricular speech, we have considerable company. The Seventh Circuit invoked *Garcetti* in concluding that the curricular and pedagogical choices of primary and secondary school teachers exceed the reach of the First Amendment. *Mayer*, 474 F.3d at 480. The Fourth Circuit has not applied *Garcetti* to teachers' in-class speech, *see Lee v. York County Sch. Div.*, 484 F.3d 687, 694 n. 11 (4th Cir.2007), and is sometimes cited as creating a division among the

circuits, *see, e.g.*, *Gorum v. Sessoms*, 561 F.3d 179, 186 n. 6 (3d Cir.2009). But that is because the Fourth Circuit disposed of the teacher's retaliation claim based on pre-*Garcetti* precedent, namely *Connick*, holding that "speech that occurs within a compulsory classroom setting" "does not constitute speech on a matter of public concern" when it is "curricular in nature." 484 F.3d at 695, 697. The Fourth Circuit's approach changes nothing here: A teacher's curricular and pedagogical choices are categorically unprotected, whether under *Connick* or *Garcetti*.

The Third Circuit also has declined to resolve the applicability of *Garcetti* to this sort of speech, *see Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 171 n. 13 (3d Cir.2008), but that too makes no difference. Its pre-*Garcetti* cases hold that, "although [a teacher] has a right to advocate outside of the classroom for the use of certain curriculum materials, he does not have a right to use those materials in the classroom." *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir.1998) (Alito, J.). The Tenth Circuit has applied *Garcetti* to a school teacher's speech *about* curriculum and pedagogy, even when made outside the classroom, *see Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1204 (10th Cir.2007), but has not addressed *in-class* curricular speech. The Second Circuit determined, in an unpublished decision, that it need not resolve whether a teacher's in-class speech is governed by *Garcetti* or by its earlier cases applying the "reasonably related to legitimate pedagogical concerns" standard of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988). *See Panse v. Eastwood*, 303 Fed.Appx. 933, 935 (2d Cir.2008). Other courts of appeals, including this one, have applied *Garcetti* in rejecting school employees'

speech claims, though not in the context of curricular and pedagogical choices. *See, e.g., Fox v. Traverse City Area Pub. Sch. Bd. of Educ.*, 605 F.3d 345, 349 (6th Cir.2010); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir.2007); *Gilder-Lucas v. Elmore County Bd. of Educ.*, 186 Fed.Appx. 885, 887 (11th Cir.2006). The common thread through all of these cases is that, when it comes to in-class curricular speech at the primary or secondary school level, no other court of appeals has held that such speech is protected by the First Amendment.

Our decision also respects Sixth Circuit authority. In *Cockrel* and in our initial decision in this case, we held that a school teacher's curricular and pedagogical choices (1) are "speech," (2) touch on "matters of public concern" and (3) may satisfy *Pickering* balancing depending on the circumstances developed in discovery or at trial. We do not disturb those holdings and indeed have ruled for the plaintiff on each one of these points today.

Not one of these Sixth Circuit cases, however, addressed whether in-class curricular speech survives the threshold inquiry announced in *Garcetti*: whether the speech was "pursuant to" the claimant's official duties. 547 U.S. at 421, 126 S.Ct. 1951. How could they? *Garcetti* came down *after* both decisions and established a new threshold requirement in this area. Evans-Marshall's failure to satisfy this requirement governs us here. "[A] plaintiff may not run home before she reaches first base." *Weathers v. Lafayette Parish Sch. Bd.*, 520 F.Supp.2d 827, 837 (W.D.La.2007).

Nor can Evans-Marshall sidestep this conclusion on the theory that *Garcetti* does not apply. In his dissent in *Garcetti*, as Evans-Marshall points out, Justice Souter raised concerns about the applicability of the decision to "academic freedom in public colleges and universities." 547 U.S. at 438, 126 S.Ct. 1951 (Souter, J., dissenting). The majority disclaimed any intent to resolve the point. *See id.* at 425, 126 S.Ct. 1951 (majority opinion) ("Justice Souter suggests today's decision may have important ramifications for academic freedom. . . . We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.").

Garcetti's caveat offers no refuge to Evans-Marshall. She is not a teacher at a "public college[ ]" or "universit[y]" and thus falls outside of the group the dissent wished to protect. The concept of "academic freedom," moreover, does not readily apply to in-class curricular speech at the high school level. As a cultural and a legal principle, academic freedom "was conceived and implemented in the university" out of concern for "teachers who are also researchers or scholars—work not generally expected of elementary and secondary school teachers." J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 Yale L.J. 251, 288 n. 137 (1989). "[U]niversities occupy a special niche in our constitutional tradition" and the constitutional rules applicable in higher education do not necessarily apply in primary and secondary schools, where students generally do not choose whether or where they will attend school. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 724-25, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007).

Even to the extent academic freedom, as a constitutional rule, could somehow apply to primary and secondary schools, that does not insulate a teacher's curricular and pedagogical choices from the school board's oversight, as opposed to the teacher's right to speak and write publicly about academic issues outside of the classroom. "[I]t is the educational institution that has a right to academic freedom, not the individual teacher." *Borden*, 523 F.3d at 172 n. 14. Academic freedom implicates "[t]he freedom of a university to make its own judgments as to education," *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.), requiring "deference to a university's academic decisions," *Grutter v. Bollinger*, 539 U.S. 306, 328, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). *See Sweezy v. New Hampshire*, 354 U.S. 234, 263, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957) (Frankfurter, J., concurring). In the context of in-class curricular speech, this court has already said in the university arena that a teacher's invocation of academic freedom does not warrant judicial intrusion upon an educational institution's decisions: "The First Amendment concept of academic freedom does not require that a nontenured professor be made a sovereign unto himself." *Parate*, 868 F.2d at 827. A school "may constitutionally choose not to renew the contract of a nontenured professor" when that professor's "pedagogical attitude and teaching methods do not conform to institutional standards." *Id.* Just so here.

III.

For these reasons, we affirm the judgment of the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed 01/25/2011]

No. 09-3775

SHELLEY EVANS-MARSHALL,
Plaintiff-Appellant,

v.

BOARD OF EDUCATION OF THE TIPP CITY EXEMPTED VILLAGE SCHOOL DISTRICT, *et al.*,
Defendants-Appellees.

ORDER

BEFORE: SILER and SUTTON, Circuit Judges; and CLELAND*, District Judge.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

* Hon. Robert H. Cleland, United States District Judge for the Eastern District of Michigan, sitting by designation

APPENDIX C

UNITED STATES DISTRICT COURT,
S.D. OHIO,
WESTERN DIVISION

No. 3:03cv091

SHELLEY EVANS-MARSHALL,
Plaintiff,

v.

BOARD OF EDUCATION OF TIPP CITY,
EXEMPTED VILLAGE SCHOOL DISTRICT, *et al.*,
Defendants.

July 30, 2008

DECISION AND ENTRY SUSTAINING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DOC. # 38); JUDGMENT TO BE ENTERED ON BEHALF OF DEFENDANTS AND AGAINST PLAINTIFF; TERMINATION ENTRY

WALTER HERBERT RICE, District Judge.

Plaintiff Shelley Evans-Marshall was formerly employed as a public school teacher at Tippecanoe High School ("Tipp High School"), by Defendant Board of Education of Tipp City Exempted Village School District ("Tipp City Board of Education" or "Board"). Evans-Marshall brings suit against the Tipp City Board of Education, as well as against Defendants Charles W. Wray ("Wray" or "Principal"),

Principal of Tipp High School, and John T. Zigler ("Zigler" or "Superintendent"), Superintendent of the Tipp City Exempted Village School District ("School District" or "District"). Doc. # 1. Suit is brought against Wray and Zigler only in their individual capacities. *Id.*

The gravamen of Evans-Marshall's complaint is that the Defendants wrongfully terminated her employment, in retaliation for her exercise of her First Amendment right to make curricular choices, while teaching at Tipp High School. *Id.* The Defendants move for summary judgment arguing that Evans-Marshall has not set forth a genuine issue of material fact as to the elements of her First Amendment claim and that, even if she has, they have sufficiently alleged that the Board would not have renewed her teaching contract even in the absence of the protected First Amendment conduct. Doc. # 38. Further, the Defendants argue that Wray and Zigler are entitled to summary judgment, on the basis of qualified immunity. *Id.*

Earlier in these proceedings, the Defendants filed a Motion to Dismiss. Doc. # 3. The Court overruled that Motion, finding that the Plaintiff had pled sufficient facts which could, should they be proven by a preponderance of evidence at trial, sustain a verdict in favor of the Plaintiff. Doc. # 12. The legal analysis in that Decision was based largely on the Sixth Circuit's decision in *Cockrel v. Shelby County School District*, 270 F.3d 1036 (6th Cir .2001). *Id.* The Defendants appealed. The Sixth Circuit affirmed, also based in large part on its previous *Cockrel* decision, along with the Supreme Court case law that was the

underpinning for that case.[1] *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223 (6th Cir.2005).[2]

The Court will now consider the Defendants' Motion for Summary Judgment, based on the more developed record that is before it. In so doing, the Court will analyze the Supreme Court's recent First Amend-

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[1] The opinion for the Court was written by Judge Cole *Evans-Marshall v. Board of Education*, 428 F.3d 223 (6th Cir 2005) Judge Sutton wrote a concurrence, wherein he concurred in the First Amendment decision, as necessitated by binding Sixth Circuit precedent (primarily as expressed in *Cockrel v. Shelby County School District*, 270 F.3d 1036, 1048 (6th Cir 2001)), but opined that the Sixth Circuit "should re-examine its First Amendment jurisprudence in the context of in-class curricular speech," based on a study of the evolving case law of the Supreme Court and other Circuits, in this and related areas (there has yet to be a Supreme Court case directly on point involving teacher in class curricular speech). *Evans-Marshall*, 428 F 3d at 234. Judge Zatkoff (sitting by designation from the Eastern District of Michigan) wrote separately, concurring in part and dissenting in part. *Id* at 238-40. Judge Zatkoff concurred with Judge Cole's First Amendment decision, "which faithfully applies this circuit's precedent in [*Cockrel*]," while concurring with Judge Sutton's concurrence, "which calls for a re-examination of this circuit's First Amendment jurisprudence regarding in-class curricular speech." *Id.* at 238 Judge Zatkoff dissented, however, with the determination regarding qualified immunity, finding no "clearly established" standard for determining a constitutional violation. *Id* at 238-40

[2] As to other proceedings between these parties, Evans-Marshall also brought suit in state court, arguing that the Board had not properly evaluated her performance and did not properly conduct the hearing to determine whether to overturn the Board's previous decision not to renew her contract, in contravention of both the Board's internal policies and Ohio law. *Evans-Marshall v Bd of Educ*, 2003 Ohio App. LEXIS 4496 (Ohio 2nd App Dist Sept 19, 2003) The trial court affirmed the Board's decision and Ohio's Second Appellate District affirmed. *Id*

ment decision in *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951 (2006), which was decided after the Sixth Circuit's previous decision in this case, to see how, if at all, the *Garcetti* decision impacts Sixth Circuit precedent in this area. To the extent necessary, the Court will then move to a discussion of the individual Defendants' entitlement to qualified immunity.

I. SUMMARY JUDGMENT STANDARD

Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U .S. 317, 322 (1986). The moving party,

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Id. at 323; *see also Boretti v. Wiscomb*, 930 F.2d 1150, 1156 (6th Cir.1991). "Once the moving party has met its initial burden, the nonmoving party must present evidence that creates a genuine issue of material fact making it necessary to resolve the difference at trial." *Talley v. Bravo Pitino Rest., Ltd.*, 61 F.3d 1241, 1245 (6th Cir.1995); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations, it is not sufficient to "simply show that there is some meta-

physical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex*, 477 U.S. at 324. "The plaintiff must present more than a scintilla of evidence in support of his position; the evidence must be such that a jury could reasonably find for the plaintiff." *Mich. Prot. & Advocacy Serv., Inc. v. Babin*, 18 F.3d 337, 341 (6th Cir.1994). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56©. Summary judgment shall be denied "[i]f there are . . . 'genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.'" *Hancock v. Dodson*, 958 F.2d 1367, 1374 (6th Cir.1992) (citation omitted). In determining whether a genuine issue of material fact exists, a court must assume as true the evidence of the nonmoving party and draw all reasonable inferences in favor of that party. *Anderson*, 477 U.S. at 255. If the parties present conflicting evidence, a court may not decide which evidence to believe, by determining which parties' affiants are more credible; rather, credibility determinations must be left to the fact-finder. 10A Wright, Miller & Kane, Federal Practice and Procedure Civil 3d § 2726 (1998).

In ruling on a motion for summary judgment (in other words, in determining whether there is a genuine issue of material fact), "[a] district court is not . . . obligated to wade through and search the

entire record for some specific facts that might support the nonmoving party's claim." *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir.1989), cert. denied, 494 U.S. 1091 (1990); *see also L.S. Heath & Son, Inc. v. AT & T Info. Sys., Inc.*, 9 F.3d 561 (7th Cir.1993); *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915 n. 7 (5th Cir.1992), *cert. denied*, 506 U.S. 832 (1992) ("Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment. . . ."). Thus, a court is entitled to rely, in determining whether a genuine issue of material fact exists on a particular issue, only upon those portions of the verified pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits submitted, specifically called to its attention by the parties.

II. FACTS[3]

The Tipp Board originally hired Evans-Marshall pursuant to a one-year contract, as a language arts teacher at Tipp High School and as an advisor for the high school's literary magazine, for the 2000-2001 academic year. Doc. # 31, Ex. C, pt. 3 at 14-15 (2000-2001 Contract). That school year passed without incident, with Evans-Marshall receiving primarily favorable comments from Principal Wray, on both her written "observations" and "evaluations." Doc. # 31, Ex. C, pt. 1 at 22-34 (2000-2001 Written Observations and Evaluations). The School Board, thus,

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[3] Since this case comes before the Court on the Defendants' Motion for Summary Judgment, the Court sets forth the facts and circumstances giving rise to such Motion in the manner most favorable to the Plaintiff, as the party against whom the Motion is directed. *Servo Kinetics, Inc. v. Tokyo Precision Instruments*, 475 F.3d 783, 790 (6th Cir 2007).

renewed her contract for the 2001-2002 school year. Doc. # 32, Attach. # 1 (Zigler Dep.) at 15.

In the fall of 2001, as she had done the previous year, Evans-Marshall choose to supplement her ninth grade English class textbook with a book entitled *Siddhartha*.[4] Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 25. This book had originally been purchased by the School District and was made available to teachers as an optional text.[5] Doc. # 32, Attach. # 1 (Zigler Dep.) at 16-17. Also, in conjunction with a study of the book Fahrenheit 415 (a book about government censorship), Evans-Marshall had presented her ninth grade English class with an assignment concerning the American Library Association's list of the 100 most challenged books in the United States, during which some of the students elected to read a book off of that list entitled *Heather Has Two Mommies*, about homosexual family relationships. Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 76-78.

At the Tipp Board meeting held on October 22, 2001 ("October Board meeting"), approximately four or five community members voiced disapproval of the content of some of the materials that were being taught in the junior and senior high schools, including *Siddhartha* and the discussions involving the 100 most challenged books. Doc. # 32, Attach. # 1 (Zigler Dep.) at 19-25, 70. At that meeting and in response to

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[4] The themes of *Siddhartha* include spirituality, Buddhism, romantic relationships, personal growth and family relationships. Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 101.

[5] Siddhartha was purchased by the school district in 1985 and was originally part of the social studies curriculum. Doc. # 32, Attach. # 1 (Zigler Dep.) at 18, 30.

Evans-Marshall being named as the teacher who had assigned *Siddhartha*, a Board member explained that that book (and at least one other book being discussed, which is not related to this case) had been purchased by the District, so their selection had nothing to do with the individual teachers who had assigned them. *Id.* at 16-17, 25. The Superintendent also explained that parents could request an alternative assignment, if they objected to any book that was assigned to their children. *Id.* at 23.

The following day, Principal Wray convened a meeting of the English faculty at the high school, during which he told Evans-Marshall that she was on the "hot seat" for parent complaints about teaching *Siddhartha*. Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 64. Approximately two weeks later, the Principal conducted his first formal "observation" of the Plaintiff for that school year and gave her all favorable comments. Doc. # 31, Ex. C, pt. 2 at 5 (Nov. 13, 2001, Teacher Observation Log).

In response to the parental complaint about the *Heather* book, the Principal asked Evans-Marshall to choose a different book from the 100 most challenged book list, which she did. Doc. # 33, Attach. # 1 (Wray Dep.) at 70-73. As to *Siddhartha*, Evans-Marshall continued to teach that book. According to her, however, Principal Wray told her that he objected to her selection of that book, as well as to the classroom discussions that went along with teaching the themes of the book.[6] Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 64-65; 74-75; 100-01.

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[6] In contrast, Principal Wray testifies that he encouraged Evans-Marshall on a couple of occasions to continue teaching the book. Doc. # 33, Attach. # 1 (Wray Dep.) at 92-93. At some

On November 26, 2001, the School Board convened another meeting ("November Board meeting"), during which much discussion ensued about the appropriateness of certain books, in the junior and senior high classrooms and libraries. Doc. # 37, Ex. # 1 (Nov. 26, 2001, Bd. Mtg. DVD; filed manually). The primary focus of the parents' concerns during that

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point in time, Evans-Marshall approached Superintendent Zigler, because she felt that the Principal was unfairly monitoring her teaching methods, based on his displeasure with her teaching *Siddhartha*. The Superintendent testifies that he assured her that was not the case. Doc. # 32, Attach. # 1 (Zigler Dep.) at 75.

At the hearing, at which the Board affirmed the decision not to renew Evans-Marshall's contract, the transcript indicates that the Board member who concluded the hearing and presented the non-renewal decision stated as follows:

> When we received the recommendation from the administration not to renew Ms. Evans-Marshall's contract, we didn't rubberstamp that request. It was a difficult decision precisely because we knew that that decision would be interpreted as being because of the reading material and class assignments that Mrs. Evans-Marshall used. And we did not want that to be the case.
>
> We were concerned that this decision may have an effect on the teachers and make them hesitant to assign works of literature to our students that are challenging and raise complex issues.
>
> And I personally believe that *Siddhartha* is a great work of literature. It's from a Nobel Prize winning author and I support the use of that book in the classroom as does our administration. That is why we gave Superintendent Zigler strict instructions to inform [the] English department of our support of that particular book and the importance of exposing students to books that expand their minds and challenge ideas that may not otherwise be addressed.

Doc. # 37, Attach. # 3 at 50 (Tr. of Bd. Mtg., pt. 2, May 13, 2002).

meeting, which lasted 1 hour and 50 minutes, was the accelerated reader list, which was a part of the junior high school library replenishment system. *Id.* Although the Board immediately decided to remove some of the junior high *library books* that were objected to, it reiterated its intent to retain *textbooks* that had been approved of and purchased by the Board and also re-explained its policy on parents requesting alternative *textbooks*, if they objected. *Id.* Despite the general focus on the junior high school library books, one parent of a ninth grade student specifically mentioned *Siddhartha*, complaining that she had requested an alternative assignment for her daughter, but that the alternative book was too elementary,[7] that her daughter felt as if she had been punished for seeking an alternative assignment, and that the assignment for the alternative book was incomprehensible to both the student and the parent. *Id.*

At some time, an office aide making photo-copies made the Principal aware that Evans-Marshall was making available to the juniors and seniors in her creative writing class two student-authored articles (among others), to use as writing samples in the event they needed them. Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 87, 125-26. One of the articles portrayed a graphic, first-hand description of a rape and the other article described the first-hand accounts of a murderer, including his slaying of a priest, along with the destruction of various religious symbols, such as the "decapitation" of a crucifix. Doc.

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[7] Evans-Marshall assigned an alternative book that was appropriate for 9-12 year old readers, whereas ninth grade student are typically 14-15 years old. *See* Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 30.

33, Ex. A. Upon the Principal's discovery of these materials, which he considered to be inappropriate for high school instruction, a heated discussion ensued between the Principal and Evans-Marshall, during which she stated something to the effect of, "I suppose anything I want copied, I have to run through Daddy to get checked." Doc. # 33, Attach. # 1 (Wray Dep.) at 77-80.

Beginning with the written "observation" the Principal made of Evans-Marshall's class on December 13, 2001, the relationship between the two of them began showing outward signs of contentiousness. On his written "observation log" for that visit, two of the six comments the Principal made were critical. In particular, he noted that "any material containing graphic violence, sexual themes, profanity, suicide, drugs and alcohol need[s] to be discussed with your department chairs before being used in class." Doc. # 31, Ex. C, pt. 2 at 6 (Teacher Observation Log, dtd. Dec. 13, 2001). By the end of that school year, the Principal recommended to the Superintendent that Evans-Marshall's teaching contract not be renewed. Doc. # 31, Ex. C, pt. 1 at 9-13 (Perf. Eval, dtd. March 21, 2002). The Superintendent accepted the non-renewal recommendation and the Board eventually approved it. Doc. # 32, Attach. # 1 (Zigler Dep.) at 93-97 (as to Superintendent); Doc. # 32, Ex. D at 24-26 (Bd. Minutes, dtd. Mar.25, 2002) (as to Board). The Board later affirmed its decision at a special Board meeting, the purpose of which was to have a statutory hearing on Evans-Marshall's non-renewal, in accordance with Ohio statutory law.[8]

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[8] The reason given by the District for not renewing Evans-Marshall's contract was that she refused to communicate with the administration and refused to be a team player. Doc # 37,

III. PLAINTIFF'S *PRIMA FACIE* CASE OF FIRST AMENDMENT RETALIATION

A. *Pre-Garcetti Sixth Circuit First Amendment Precedent*

In its previous opinion in this case, the Sixth Circuit set forth a road-map as to the pre-*Garcetti* (and perhaps the post-*Garcetti* ?) approach to First Amendment cases pertaining to in-class teacher speech. Therein, the Court explained that, in order to establish a *prima facie* case of First Amendment retaliation, a public school teacher must allege:

> (1) that [she] was engaged in a constitutionally protected activity;
>
> (2) that the defendant's adverse action caused [her] to suffer an injury that would likely chill a person of ordinary firmness from continuing in that activity; and
>
> (3) that the adverse action was motivated at least in part as a response to the exercise of [her] constitutional rights.

Evans-Marshall v. Bd. of Educ., 428 F.3d 223, 228 (6th Cir.2005) (quoting *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1048 (6th Cir.2001)). The Court will now provide a brief discussion of each of these elements.

Attach. # 3 at 51 (Tr. of Bd Mtg., pt. 2, May 13, 2002). Evans-Marshall, on the other hand, contended that the decision was in retaliation for her curricular choices. Doc. # 37, Attach. # 2 at 6-7 (Tr. of Bd. Mtg., pt. 1, May 13, 2002).

1. *Whether a Plaintiff was Engaged in Constitutionally Protected Activity*

The first element of a plaintiff's *prima facie* case is the only one that is possibly impacted by the recent Supreme Court decision in *Garcetti*. The impact, if any, of that decision, will be explained later in this Opinion. For purposes of the present discussion, the Court will focus on Supreme Court and Sixth Circuit guidance prior to *Garcetti*.

In order to establish that a plaintiff was engaged in a constitutionally protected activity, a court must first determine whether the plaintiff's activity constituted "speech" within the meaning of the First Amendment. *Evans-Marshall*, 428 F.3d at 229 (citing *Cockrel*, 270 F.3d at 1048). If so, the court moves to a two-part analysis, deciding first whether the plaintiff "was disciplined for speech that was directed toward an issue of public concern" (it is this step to which *Garcetti* potentially pertains) and then whether the plaintiff's "interest in speaking as [she] did outweighed the [school's] interest in regulating [her] speech." *Id.* (quoting *Cockrel*, 270 F.3d at 1050 and *Hardy v. Jefferson Cmty. College*, 260 F.3d 671, 678 (6th Cir.2001)).

This approach has been referred to as the Pickering-Connick balancing test, in that it was first announced by the Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968), and later refined in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983). In *Pickering*, the Supreme Court explained that a balance must be struck between "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it

performs through its employees." *Pickering*, 391 U.S. at 568. In *Connick*, the Court instructed that courts must first determine whether "a public employee speaks . . . as a citizen upon matters of public concern [or] as an employee upon matters only of personal interest." *Connick*, 461 U.S. at 147. If the employee is speaking as an employee upon matters only of personal interest, such speech is generally not afforded First Amendment protection, whereas if she is speaking as a citizen upon matters of public concern, it is. *See Id.*

2. *Whether a Defendant's Adverse Action Caused Plaintiff to Suffer Injury that would Likely Chill a Person of Ordinary Firmness from Continuing in Activity*

The second element of a plaintiff's prima facie case requires a showing that the defendant's adverse action caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing in that activity. *Evans-Marshall*, 428 F.3d at 228. The Sixth Circuit has held that non-renewal of a teaching contract is "an injury that would likely chill a person of ordinary firmness from continuing in [the] activity." *Id.* at 232 (quoting *Cockrel*, 270 F.3d at 1055).

3. *Whether Adverse Action was Motivated at Least in Part as Response to Exercise of Constitutional Rights*

The final element of a First Amendment retaliation claim requires a plaintiff to show that the adverse action taken against her was motivated at least in part as a response to the exercise of her constitutional rights. *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 228 (6th Cir.2005). The Sixth Circuit

instructs that "the nonmoving party may not rely on the mere fact that an adverse employment action followed speech that the employer would have liked to prevent. Rather, the employee must link the speech in question to the defendant's decision to dismiss her." *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1055 (6th Cir.2001) (quoting *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 145 (6th Cir.1997)). "In other words," the Court continues, "to survive defendants' motion for summary judgment, [the plaintiff] must present sufficient evidence to allow a reasonable factfinder to conclude, by a preponderance of the evidence, that her speech, at least in part, motivated the defendants to discharge her." *Id.* (citing *Bailey*, 106 F.3d at 145).

B. *Impact of Garcetti on Sixth Circuit Precedent*

In *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951 (2006), the plaintiff, Ceballos, was a deputy district attorney. The controversy began when Ceballos examined an affidavit that had been prepared to obtain a search warrant in a criminal case and determined that there were serious misrepresentations thereon. *Id.* at 413-14. He then wrote a memorandum to his supervisors, recommending that the case be dismissed, due to the erroneously prepared affidavit. *Id.* at 414. The supervisor nevertheless proceeded with the prosecution of the case. *Id.* Ceballos ultimately brought suit alleging that he had been subjected to retaliatory employment actions (i.e., reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse and denial of a promotion) as a result of preparing the memorandum. *Id.* at 414-15.

The Supreme Court framed the issue before it as being "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties." *Id.* at 413. In resolving this issue, the Court initially looked at its earlier decisions in *Pickering* and *Connick* and highlighted the two inquiries that guide courts in the interpretation of the constitutional protections accorded to public employee speech.

> The first [inquiry] requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.

Id. at 418 (citing *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731 (1968) and *Connick v. Myers*, 461 U.S. 138, 147, 103 S.Ct. 1684 (1983)). The Court then went on to explain that "this consideration reflects the importance of the relationship between the speaker's expressions and employment." *Id.* "A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." *Id.*

The Court ultimately determined that the controlling factor in these cases is whether public employees' expressions are made pursuant to their duties as employees, holding that "when public employees

make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421. Finding that Ceballos, in that case, wrote his memorandum because "that is part of what he, as a . . . deputy, was employed to do," the Court concluded that his speech was not entitled to First Amendment protection. *Id.* at 421-22.

In Justice Souter's dissenting opinion, one of the concerns expressed was the breadth of the majority's holding, specifically as it might apply to certain academic freedom cases.[9]

> This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a *public university professor*, and I have to hope that today's majority does not mean to imperil First Amendment protection of *academic freedom in public colleges and universities*, whose teachers necessarily speak and write "pursuant to . . . official duties."

Id. at 712 (emphasis added) (quoting and citing *Grutter v. Bollinger*, 539 U.S. 306, 329, 123 S.Ct. 2325 (2003); *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 77 S.Ct. 1203 (1957) (explanatory parentheticals omitted)). In response to this concern, the majority concluded its opinion with the following caveat:

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[9] The majority opinion was written by Justice Kennedy and joined by Chief Justice Roberts and Justices Scalia, Thomas and Alito. There were three separate dissenting opinions—one by Justice Stevens, one by Justices Souter and Ginsburg, and one by Justice Breyer

> Justice Souter suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. . . . There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to *scholarship or teaching*.

Id. at 425 (emphasis added). It is important to note that while Justice Souter's concerns were specifically directed to the university setting (focusing on the teachings of "public university professors" and academic freedoms found in "public colleges and universities"), the majority's language is far broader in that it pertains to "speech related to scholarship or teaching."

C. Application of Legal Standards to Present Case

As just explained, in *Garcetti*, the Supreme Court refined the first phase of the Pickering-Connick analysis (whether the employee was disciplined for speech that was made as a citizen and directed toward an issue of public concern) by directing the focus to whether the public employee made the statement pursuant to his official duties. *Garcetti*, 547 U.S. at 421-22; *see also Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 542 (6th Cir.2007) (noting that *Garcetti* clarified the "as a citizen" part of this analysis). The question before this Court, then, is whether *Garcetti* is applicable to the facts of the present case. If so, the resolution of this case will be

an easy one, in that it is hard to imagine how a public high school teacher's curricular speech is not made "pursuant to her official duties," since that is precisely what she is employed to do. *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir.), *cert. denied*, 128 S.Ct. 160 (2007) (holding that school boards hire teachers specifically for their curricular speech).

The only two Circuits to have addressed this issue so far have been the Seventh and the Fourth Circuits. The Seventh Circuit determined that *Garcetti* applies in the context of the classroom speech of K-12 public school teachers, while the Fourth Circuit determined that it did not. *Contrast Mayer*, 474 F.3d 477 (7th Cir.2007)[10] (finding that "*Garcetti* applie[d] directly," based on Seventh Circuit precedent that held that public school students, who are a captive audience, should not be subjected to teachers' idiosyncratic perspectives; rather, elected school boards should make policies about teaching contentious issues) with *Lee v. York County Sch. Div.*, 484 F.3d 687, 695 n. 11 (4th Cir.), *cert. denied*, 128 S.Ct. 387 (2007) (continuing to apply traditional Pickering-Connick approach, because the Supreme Court did not "explicitly . . . decide whether [the *Garcetti*] analysis would apply in the same manner to a case involving speech related to teaching"); *see also Pittman v. Cuyahoga Valley Career Ctr.*, 451 F.Supp.2d 905, 929 (N.D.Ohio 2006)

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[10] *See also Samuelson v. Laporte Cmty. Sch. Corp.*, 526 F.3d 1046, 1052 (7th Cir.2008) (in a prior restraint case, holding that speech which was covered by a policy that required that concerns regarding teachers' job responsibilities be addressed through the chain of command was grounded in the public employee's professional duties and therefore not protected by the First Amendment)

(refusing to resolve the question of the applicability of *Garcetti* to public school teacher case and concluding that the case was resolved the same under both *Garcetti* and traditional Pickering-Connick analysis).

Based on the explicit caveat in the majority opinion of *Garcetti* that the Court's decision therein did not necessarily apply "in the same manner to a case involving speech related to scholarship or teaching," *Garcetti*, 547 U.S. at 425, this Court agrees with the Fourth Circuit that it is not clear that *Garcetti* necessarily applies to the facts of this case.[11] Thus, absent Sixth Circuit or further Supreme Court guidance to the contrary, this Court will continue to apply the traditional Pickering-Connick approach to cases involving in-class speech by primary and secondary public school teachers.

The Court, therefore, returns to the elements of a traditional *prima facie* case of First Amendment retaliation, as set forth in the original Sixth Circuit decision in this case, in order to decide if there is a genuine issue of material fact as to any of those elements.

Before beginning this analysis, the Court will first distill the lengthy arguments made by the parties, in order to hone in on which "speech" is actually in dispute. An initial reading of the Complaint indicated

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[11] The Defendants argue that the Supreme Court has already concluded that the concept of "academic freedom" does not apply to elementary and secondary education Doc. # 44 at 8 (citing *Edwards v. Aguillard*, 482 U.S. 578, 586 n. 6, 107 S.Ct. 2573 (1987) and *Illinois ex rel McCollum v Bd. of Ed.*, 333 U.S. 203, 231, 68 S.Ct. 461 (1948)) While this may be true, the *Garcetti* Court's caveat applied to "case[s] involving speech related to *scholarship or teaching*," which this Court understands to be considerably broader than cases involving "academic freedom."

that the speech in question apparently consisted of the Plaintiff's teaching of the books *Siddhartha*, *Fahrenheit 451* and *To Kill a Mockingbird*, and the viewing of the movie *Romeo and Juliet*. Doc. # 1 ¶¶ 17, 20. A review of the briefs submitted in support of and in opposition to the Defendants' Motion for Summary Judgment, however, indicates that the disputed speech actually consists of the books *Siddhartha* and *Heather Has Two Mommies*, the Romeo and Juliet movie and the two student-authored stories.[12]

1. *Whether Plaintiff was Engaged in Constitutionally Protected Activity*

The Sixth Circuit previously determined that the Plaintiff's conduct, in this case, constituted "speech," because the disputed materials (as indicated in the Complaint) were "clearly protected by the First Amendment." *Evans-Marshall*, 428 F.3d at 230. Further, Sixth Circuit precedent "establishes that the assignment by a public school teacher of protected material is itself 'speech' within the meaning of the First Amendment." *Id.* (citing *Cockrel*, 270 F.3d at 1049). The parties do not argue this point, in their

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[12] As to *Fahrenheit 415* (a book about government censorship), the Plaintiff does not allege that the Defendants disapproved of the fact that she taught that book. Rather, the Plaintiff asserts that the disapproval was focused on her method of teaching the theme of that book, to include, in particular, the teaching of *Heather Has Two Mommies*, a book on the list of the 100 most challenged books. See Doc. # 41 (Pl.'s Mem. Opp'n) at 11, 30; Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 100-01.

Other than the Plaintiff's initial statement in her Complaint that she taught the book *To Kill a Mockingbird*, there are no facts alleged either in the Complaint or in the summary judgment briefs regarding this book.

summary judgment memoranda. In accordance with the Sixth Circuit's previous determination, as published works, the *Heather* book, like *Siddhartha* and *Romeo and Juliet*, would be considered speech. *See Evans-Marshall*, 428 F.3d at 230 (citing *Metzger v. Pearcy*, 393 F.2d 202, 204 (7th Cir.1968) for the proposition that movies and books "are protected by the constitutional guarantees of freedom of speech and press"). Likewise, the two student-authored stories would be considered speech, under both Supreme Court and Sixth Circuit precedent. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273, 108 S.Ct. 562 (1988) (considering student articles submitted for publication in school newspaper as "speech"); *Curry v. Hensiner*, 513 F.3d 570, 577 (6th Cir.Mich.2008) (considering candy cane pipe-cleaner ornament, made by elementary school student, to be "speech"). Having found that all of the disputed materials are "speech," the Court will now turn to the two parts of the Pickering-Connick balancing test: whether the speech was directed toward an issue of public concern and whether the Plaintiff's interest in speaking as she did outweighed the Defendants' interest in disciplining her for such speech.

a. Speech Directed Toward Issue of Public Concern

In determining whether the Plaintiff was disciplined for speech that was directed toward an issue of public concern,[13] the previous Sixth Circuit opinion in

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[13] To reiterate, the Sixth Circuit's traditional approach is to focus here on whether the speech "touched on a matter of public concern," whereas the *Garcetti* approach is to focus on "whether public employees' expressions are made pursuant to their duties as employees." *Garcetti*, 547 U.S. at 421; *Evans-Marshall*, 428 F.3d at 230.

this case, while addressing *Siddhartha* and *Romeo & Juliet*, drew the inference that the Plaintiff taught the main themes of these works and concluded that such content is clearly a matter of public concern. *Evans-Marshall*, 428 F.3d at 230-31. In so concluding, the Court cited *Hardy v. Jefferson Cmty. College*, 260 F.3d 671, 679 (6th Cir.2001), for the proposition that "race, gender, and power conflicts in our society" are "matters of overwhelming public concern" (these themes were portrayed in *To Kill a Mockingbird*, the teaching of which is no longer a matter of dispute herein) and added that the main themes of the other materials (spirituality, in *Siddhartha*, and the intersection of love and politics, in *Romeo and Juliet*) were similarly matters of public concern. *Evans-Marshall*, 428 F.3d at 231.

The Defendants do not contest this determination, in their memoranda supporting their Motion for Summary Judgment (rather, they argue that the Court should rule in their favor, as a result of the application of the second part of the Pickering-Connick test, as described below). *See* Doc. # 38 at 30-34; Doc. # 44 at 11. On this point, the Plaintiff argues that the controversial themes (homosexuality, drug abuse, rape, religious killing and destruction of religious objects) in the materials she assigned, including the *Heather* book and the writing samples of the two students, were topics of local, national and international concern, as evidenced by reading daily reports in the media. Doc. # 41 at 32-34.

The facts of this case indicate that the Plaintiff did teach the major themes of *Siddhartha* and *Romeo & Juliet*, as assumed by the Appellate Court. Thus, the Court is left with the Sixth Circuit's previous holding, as to the teaching of these materials being directed

toward issues of public concern. The only additional facts to consider, on this point, are the teachings of the *Heather* book (dealing with homosexual families) and the two student-authored stories (pertaining to rape and the murder of a priest/destruction of religious materials). Viewing these themes in the same vein as the Appellate Court viewed the themes of the other materials leads to the conclusion that these additional materials also pertain to matters of public concern, it being hard to distinguish homosexuality, rape and religious violence from the other themes, as they all receive prime exposure in the media's coverage of today's local and world events. Thus, the Court concludes that the Plaintiff's speech touched on matters of public concern.

b. *Whether Plaintiff's Interest in Speaking as She Did Outweighed Defendants' Interest in Disciplining Her for Such Speech*

Having decided that the speech in question was directed toward issues of public concern, the Court now turns to the second part of the Pickering-Connick analysis-whether the Plaintiff's interest in speaking as she did outweighed the Board's interest in disciplining her for such speech. In the *Evans-Marshall* appellate decision, the Sixth Circuit determined that it was premature, at the motion to dismiss stage of the litigation, to consider the Defendants' alleged interests, as espoused on brief. *Evans-Marshall*, 428 F.3d at 231-32. The Court also pointed out its precedent regarding disciplining a teacher's controversial speech, when that speech had received prior approval from the school district. In general, the Sixth Circuit's previous cases establish that courts should not afford much weight to a school's

alleged interest in disciplining a teacher, if the school previously approved the speech in question and then later took action as a result of a public outcry related to the same. *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1054 (6th Cir.2001); *Stachura v. Truszkowski*, 763 F.2d 211, 214-15 (6th Cir.1985), *rev'd on other grounds*, 477 U.S. 299, 106 S.Ct. 2537 (1986). Because there was an indication of such a fact pattern, in the present Complaint, the Court refused to grant the Defendants' Motion to Dismiss, on this point. *Evans-Marshall*, 428 F.3d at 232 (noting that the three novels and the movie, the teachings of which the Complaint indicated were the reasons for the Plaintiff's dismissal, had been purchased and approved of by the Board).

i. *Defendants' Interest in Disciplining Plaintiff for her Speech*

In order to conduct the balancing test in question, the Court must presume that the Defendants decided not to renew the Plaintiff's contract, at least in part, because of her teachings of said materials. At the outset, the Court notes that the Defendants emphatically deny that they disciplined the Plaintiff as a result of such speech. Doc. # 38 at 30-34. Recognizing that the Court will assume these facts for purposes of conducting the balancing test, however, the Defendants argue, in general, that case law recognizes that school boards have considerable leeway in regulating classroom speech, in order to accommodate legitimate pedagogical concerns, and more specifically, have the ability to select and require adherence to a school board's stated curriculum. Doc. # 38 at 31-32 (citing, among others, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273, 108 U.S. 562 (1988) (noting that "educators do not offend the First Amendment by

exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns" (student speech case));[14] *Edwards v. Aguillard*, 482 U.S. 578, 583, 107 S.Ct. 2573 (1987) (holding that "[s]tates and local school boards are generally afforded considerable discretion in operating public schools" (establishment clause case)); *Lacks v. Ferguson Reorganized Sch. Dist.* R-2, 147 F.3d 718, 724 (8th Cir.1998) (finding that school board had legitimate academic interest in promoting generally acceptable social standards and, thus, could punish teacher for allowing profanity in student works (case involving teacher's First Amendment rights to allow student profanity in classroom written and video work))[15]; *Webster*

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[14] There is a difference in analyzing student speech cases and teacher speech cases. Furthermore, there is a difference in analyzing different types of student speech cases. *See Hazelwood Sch Dist. v Kuhlmeier*, 484 U.S. 260, 273, 108 S.Ct. 562 (1988) (in cases involving educators' authority over school-sponsored speech, question is whether restrictions imposed are reasonably related to legitimate pedagogical concerns); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512-513, 89 S.Ct. 733 (1969) (in cases involving student speech that simply happens to occur on school premises, standard is whether the speech causes a material disruption or invades another's rights).

[15] In *Lacks*, a case with similar facts to the present case, the plaintiff high school English teacher permitted her students to use profanity in their presentation of student-authored short plays and permitted a student to read aloud his poem "which contained profanity and graphic descriptions of oral sex," and was subsequently fired for doing so *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718 (8th Cir 1998). In determining that the school district did not violate the teacher's First Amendment rights, the Eighth Circuit pointed out that the school board in question in that case, in its opinion terminating the teacher's employment,

v. New Lenox School Dist. No. 122, 917 F.2d 1004 (7th Cir.1990) (finding that state had compelling interest in selection of and requiring adherence to suitable curriculum and that individual teachers did

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> wrote that the purpose of the board's disciplinary policies is "to establish, to foster, and to reflect the norms and standards of the community its serves . . ." Allowing one student to call another a "fucking bitch" and a "whore" in front of the rest of the class, and allowing a student to read aloud a poem that describes sexual encounters in the most graphic detail, as the students did in Lacks's classroom, hardly promotes these shared social standards. We consider the matter too plain for argument.

Id at 724. In reaching its conclusion, the Appellate Court cited three Supreme Court cases, to wit:

> The Supreme Court has written that public education "'must inculcate the habits and manner of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.'" *Bethel Sch Dist v. Fraser*, 478 U.S 675, 681, 106 S.Ct. 3159 (1986) (quoting C Beard & M. Beard, New Basic History of the United States 228 (1968)). While students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Independent Community School District*, 393 U S 503, 506, 89 S.Ct. 733 (1969), students' First Amendment rights "in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Fraser*, 478 U S at 681 Accordingly, the Supreme Court has held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns" *Hazelwood School District v. Kuhlmeier*, 484 U S 260, 273, 108 S Ct 562 (1988)

Id

not have right to make such curriculum choices (teacher classroom speech case)).

As to the Tipp Board of Education's specific interest in not renewing the Plaintiff's contract, the Defendants point to, among other things, the provision in the Ohio Revised Code that gives local school boards the responsibility of prescribing school curricula and the Tipp City Board of Education policy that similarly provides as follows: "Legal responsibility for adoption of curriculum resides with the Board of Education." Doc. # 38 at 32 (citing Ohio Rev.Code Ann. § 3313.60[16] and Doc. # 37, Attach. # 1 (Tipp Board Policy on Curriculum Adoption) at 9). The Defendants also point out that the elected School Board is accountable to the public for the education of the community's school children, whereas individual school teachers are not. *Id.* The thrust of the Defendants' argument here is that the Board is legally responsible for selecting its curriculum and is accountable to the community for so doing and, thus, its interest in controlling the curricular choices of its individual teachers outweighs the Plaintiff's claimed right to assign materials of her choosing.

The Defendants also argue that the actions complained of as retaliation were simply the result of the Defendants performing their required duties as administrators of their school system and that the they had an interest in properly administering such. For example, the Defendants point to the fact that Board policy specifically assigns the principal the role

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[16] In pertinent part, Section 3313.60 provides as follows: "The board of education of each city and exempted village school district . . . shall prescribe a curriculum for all schools under [its] control." Ohio Rev.Code. Ann. § 3313.60(A).

of conferring with teachers as to the advisability of teaching certain controversial issues.[17] Doc. # 37, Attach. # 1 at 23 (Tipp Board Policy re. Teaching about Controversial Issues). It is also the principal's job to conduct periodic observations of teachers and to make suggestions for improvements. Doc. # 38 at 33 (citing *Evans-Marshall v. Bd. of Educ.*, 2003 Ohio App. LEXIS 4496, *10 (Ohio 2nd App. Dist. Sept. 19, 2003), and Ohio Rev.Code Ann. § 3319 .111).[18]

In opposition to the Defendants' arguments, the Plaintiff states that although it is true that the Board has authority to set its curriculum, it delegated the day-to-day implementation of the specifics of curricular choices to the individual teachers. Doc. # 41 at 34-37. In support of this statement, the Plaintiff points to the Board's Policy, which provides that it "delegates to the professional personnel of the

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[17] After setting forth several guidelines for teachers to follow in determining whether inclusion of controversial materials in teaching assignments is appropriate, the pertinent portion of the Policy provides as follows: "A teacher who is in doubt about the advisability of discussing certain issues in the classroom should confer with the principal as to the appropriateness of doing so. If discussion of an issue is not approved by the building principal, the teacher may refer the issue to the Superintendent." Doc. # 37, Attach. # 1 at 23.

[18] As recognized by Ohio's Second District Appellate Court in the earlier case in state court, involving these parties, the Ohio Revised Code states that a "limited contract teacher[ ] should receive a written report documenting her evaluation. The written report must include 'specific recommendations regarding any improvements needed in the performance of the teacher being evaluated and regarding the means by which the teacher may obtain assistance in making such improvements.'" *Evans-Marshall v. Bd. of Educ.*, 2003 Ohio App. LEXIS 4496, *10 (Ohio 2nd App. Dist. Sept. 19, 2003) (quoting Ohio Rev.Code Ann. § 3319.111(B)(3)).

District authority for the selection of instructional and library materials."[19] Doc. # 37, Attach. # 1 at 16 (*Tipp Board Policy re. Instructional Materials*). The Plaintiff also states that it was the practice in the District for the Board to adopt a textbook for each course and then to allow the teachers to supplement the textbook with materials of their choosing, in order to achieve the general goals and objectives of each course. Doc. # 32, Attach. # 1 (Zigler Dep.) at 79; Doc. # 36, Attach. # 1 (Bishop Dep.) at 30, 60.

The Plaintiff also argues that the School District expected controversial issues to be included in the

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[19] The entirety of the context of that statement, from the Board Policy provides as follows:

> As the governing body of the District, the Tipp City Exempted Village Board of Education is legally responsible for the selection of instructional materials. Since the Board is a policy-making body, it delegates to the professional personnel of the District authority for the selection of instructional and library materials.
>
> Materials for school classrooms and school libraries will be selected by the appropriate professional personnel *in consultation with the Superintendent, faculty and other sources as needed*. Final decision on purchase will rest with the Superintendent, subject to official adoption by the Board in the case of textbooks.
>
> The Board believes that it is the responsibility of the District:
>
> 1. to provide materials that will enrich and support the curriculum, taking into consideration the varied interests, abilities and *maturity levels* of the students served;
>
> 2. to provide materials that will stimulate growth in factual knowledge, literary appreciation, aesthetic values and *ethical standards*; . . .
>
> The above principles . . will serve as a guide in the selection of all instructional [materials].

Doc. # 37, Attach. # 1 at 16 (emphasis added).

curriculum, as evidenced by the Board's Policy that states that "[o]nly through the study of [some controversial issues] will youth develop the abilities needed for citizenship in our democracy."[20] Doc. # 37, Attach. # 1 at 387 (Tipp Board Policy re. Teaching Controversial Issues).

ii. *Plaintiff's Interest in Speaking as She Did*

The Plaintiff does not clearly articulate her "interests in speaking as she did," so, in order to conduct the necessary balancing test, it is left to the Court to piece together what appears to be her interest in teaching the disputed materials.[21] Upon a review of

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[20] In context, that statement reads as follows

> Most of the Tipp City Exempted Village School District curriculum is composed of established truths and accepted values, but it also includes controversial issues. The public schools include the study of some important unsolved problems that involve controversial issues. Only through the study of such issues will youth develop the abilities needed for citizenship in our democracy.
>
> Doc. # 37, Attach. # 1 at 387. The Policy goes on to provide that teachers will use certain criteria for determining the appropriateness of issues for consideration as part of the curriculum, to include whether the issues are in "the range, knowledge, maturity and competence of the students." *Id.*

[21] In the section of the Plaintiff's Memorandum in Opposition entitled "Plaintiff's Interest in Speech Outweighed the School District's Interest in Regulating Plaintiff's Speech," the Plaintiff does not articulate any "interest" she had in teaching the disputed materials, rather, the entirety of her argument is devoted to assertions of why the Defendants' stated interests in regulating the Plaintiff's speech are improper. *See* Doc. # 41 at 34-37. The arguments presented here are ones that the Court has gleaned from other portions of the Plaintiff's Memorandum, supporting evidentiary materials and the Complaint.

the Rule 56 materials on the record that are offered in support of the general arguments made in the Plaintiff's brief, the Court concludes that the Plaintiff seems to be asserting that she had an unequivocal right to select materials to supplement the Board-chosen textbooks for each of her classes and the methods for teaching the same. Doc. # 1 (Compl.) ¶ 32 ("A central tenet of academic freedom is the ability of the teacher to select books and methods of instruction for use in the classroom without interference from public officials."). In particular, the Plaintiff implies that she had the right to teach controversial topics of her choosing, apparently in the manner she wanted and without interference from school officials. Doc. # 41 at 32-33 (citing Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 95, in support of the statement that "Plaintiff believe[s] that students have the right to learn to express themselves well on any topic and that she, as an instructor, has a vested interest in empowering her students to do so.")[22]

In support of these views, the Plaintiff points to the fact, as highlighted above, that the Tipp Board had an open-ended curriculum that focused on the skills

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[22] With regard to the *Heather* book, the Plaintiff's brief provides that "*Heather* dealt with alternative families, a pertinent contemporary issue that Plaintiff felt should be debated." Doc. # 41 at 31 (citing Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 116)).

As to the two student-authored articles in question, the Plaintiff implies that she had an interest in teaching the students in her college preparatory American literature class about "media literacy," by "helping them distinguish gratuitous sex or violence-which they met in the media every day-and sex or violence which is presented in an artistic form in pursuit of a theme." *Id.* at 25 (citing Doc. # 31, Attach. # 1 (Evans-Marshall Dep) at 92, 121-25)).

students needed to learn each year, while allowing the teachers the latitude to supplement the textbooks with other materials of their choosing. Doc. # 32, Attach. # 1 (Zigler Dep .) at 78-79; Doc. # 36, Attach. # 1 (Bishop Dep.) at 30. The Plaintiff also points to the Board's policy that gives students certain "rights" in the study of controversial materials, to wit:

> 1. the right to study any controversial issue that has political, economic, or social significance and concern, of which (*at the student's level*) he should begin to have an opinion;
>
> 2. the right to have free access to all relevant information, including the materials that circulate freely in the community;
>
> 3. the right to study under competent instruction in an atmosphere free from bias and prejudice and
>
> 4. the right to form and express his own opinions on controversial issues without thereby jeopardizing relations with his teachers or the school.

Doc. # 37, Attach. # 1 at 387 (Tipp Board Policy on Teaching about Controversial Issues) (emphasis added).

iii. *Balancing of Interests*

In sum, the Defendants argue that they have an interest in controlling their teachers' curricular choices, because the Board of Education is accountable for the District's curriculum in the eyes of Ohio statutory law and internal policy, as well as being generally accountable for such to its constituents in the community. The Defendants also argue that they have an interest in the day-to-day administration of the District (*e.g.*, conferring with teachers as to the

advisability of teaching certain matters and proposing ways, in general, in which teachers might make improvements). The Plaintiff, on the other hand, asserts that she has an interest in supplementing the prescribed classroom textbooks with the materials and methods of instruction that she chooses, in accordance with various Board policies.

Upon consideration of these stated interests, the Court concludes, notwithstanding the issue of whether the Board pre-approved the teaching of certain materials (the concern highlighted by the Sixth Circuit in *Cockrel v. Shelby County School District*, 270 F.3d 1036, 1053-54 (6th Cir.2001)), which will be addressed forthwith, that the Board's interest in regulating the Plaintiff's selection of instructional materials and methods of instruction far outweighed the Plaintiff's right to use whatever supplemental materials and methods she chose. While the Board's regular practice might have been to allow its teachers the latitude to select supplemental materials and incorporate instructional methods of their choosing, this does not give a teacher the "right" to do so, if the administrators or the Board do not approve of such selections. For example, a Spanish teacher should not have the "right" to supplement his Spanish textbook with instructional materials on how to speak Japanese, if the administrators do not approve. Or, a trigonometry teacher who decides that mathematical basics are "passe" should not have the "right" to implement a supplemental new-wave method of teaching mathematics, if the Board does not concur. The Court sees little difference in directing an English teacher as to the kinds of supplemental materials and methods she may or may not use, in order to achieve the curricular goals that the Board is

ultimately responsible for establishing and implementing, for any given course.[23]

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[23] Although neither the Supreme Court nor the Sixth Circuit has directly addressed the balance between a public primary or secondary school district's interest in dictating the curricular speech of its teachers with a teacher's interest in independently choosing such curriculum, without the factual component of preapproval of the speech in question, this holding is in concert with both Supreme Court and Sixth Circuit decisions on similar issues, as well as with other appellate courts that have directly addressed the issue *See Hazelwood Sch Dist. v. Kuhlmeier*, 484 U S. 260, 267, 108 S.Ct 562 (1988) (recognizing, in student speech case, that "[t]he determination of what manner of speech in the classroom . . . is inappropriate properly rests with the school board . . . ." (internal quotation omitted)); *Cockrel v Shelby County Sch. Dist* , 270 F 3d 1036, 1054 (6th Cir 2001) (in teacher speech case, involving pre-approval of disputed speech, stating that, "[w]hile ordinarily we would give substantial weight to the government employer's concerns of workplace efficiency, harmony, and discipline in conducting our balancing of the employee's and employer's competing interests, we cannot allow these concerns to tilt the Pickering scale in favor of the government, absent other evidence, when the disruptive consequences of the employee speech can be traced back to the government's express decision permitting the employee to engage in that speech"); *Stachura v Truszkowski*, 763 F.2d 211, 215 (6th Cir.1985), *rev'd on other grounds*, 477 U S 299, 106 S Ct. 2537 (1986) (same general holding, on similar facts).

Minarcini v. Strongsville City School District, 541 F 2d 577 (6th Cir.1976), involved a suit brought by high school students against the school board and administrators claiming a violation of their First Amendment rights because, among other things, the Board had not approved of certain textbooks for inclusion in the curriculum, which had been requested by the faculty. In ruling against the plaintiffs, on this point, the Court stated,

> Clearly, discretion as to the selection of textbooks must be lodged somewhere and we can find no federal constitutional prohibition which prevents its being lodged in school board officials who are elected representatives of the

Furthermore, while the Board's policy might have outlined certain students' "rights" with regard to the study of controversial topics, those "rights" were tempered with the proviso that such instruction be age appropriate. If a teacher and an administrator or a school board differ in what they believe falls within the range of "age appropriate" teaching materials, the board's determination (or the determination of its chosen administrators) should control, for it is the

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> people. To the extent that this suit concerns a question as to whether the school faculty may make its professional choices of textbooks prevail over the considered decision of the Board of Education empowered by state law to make such decisions, we affirm the decision of the District Judge in dismissing that portion of plaintiffs' complaint. In short, we find no federal constitutional violation in this Board's exercise of curriculum and textbook control as empowered by the Ohio statute.

Id. at 579-80, *see also Lee v. York County Sch. Div* , 484 F.3d 687, 695 (4th Cir.), *cert. denied*, 128 S.Ct. 387 (2007) (concluding that "public schools possess the right to regulate speech that occurs within a compulsory classroom setting, and . . a school board's ability in this regard exceeds the permissible regulation of speech in other governmental workplaces or forums"); *Mayer v Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir.), *cert. denied*, 128 S.Ct. 160 (2007) ("[T]hose authorities charged by state law with curriculum development [may] require the obedience of subordinate employees, including the classroom teacher." (internal quotation omitted)); *Edwards v. California Univ.*, 156 F.3d 488, 491 n. 1 (3d Cir.1998) (recognizing that "public school teachers must abide by school policy or dictates when choosing their curriculum [and] . . . that a public school teacher's in class conduct is not protected by the First Amendment (internal quotation omitted)); *Bishop v Aronov*, 926 F.2d 1066, 1073 (11th Cir.1991) (holding that "where the in-class speech of a teacher is concerned, the school has an interest . . . in scrutinizing expressions that the public might reasonably perceive to bear its imprimatur" (internal quotation omitted)).

board that is ultimately responsible for the education of the students, not the teacher.[24]

Thus, as long as the materials do not otherwise fall within the "pre-approved materials" caution, as noted by the Sixth Circuit in the previous decision in this case and in *Cockrel v. Shelby County School District*, 270 F.3d 1036, 1053-54 (6th Cir.2001), the Pickering-Connick balance weighs in favor of the Defendants and the granting of the Defendants' Motion for Summary Judgment is warranted.

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[24] On this point, the Seventh Circuit recently provided the following commentary:

> Majority rule about what subjects and viewpoints will be expressed in the classroom has the potential to turn into indoctrination; elected school boards are tempted to support majority positions about religious or patriotic subjects especially. But if indoctrination is likely, the power should be reposed in someone the people can vote out of office, rather than tenured teachers. At least the board's views can be debated openly, and the people may choose to elect persons committed to neutrality on contentious issues . . . The Constitution does not entitle teachers to present personal views to captive audiences against the instructions of elected officials.

Mayer v Monroe County Cmty. Sch Corp , 474 F.3d 477, 480-81 (7th Cir), *cert. denied* 128 S Ct 160 (2007). In the present case, the issue is not whether the Plaintiff was expressing her own viewpoints about the subject matters in question (homosexuality, rape, violence, etc), but whether teaching such subjects should be part of the curriculum to the extent the Plaintiff was including them The Court finds very little difference in regulating a teacher's spoken personal viewpoints about certain subjects and her choice of supplemental materials or methods of instruction about teaching certain subjects. In either instance, the elected board of education should have the ultimate say as to whether the "speech" is both age appropriate and well-suited to the overall school curriculum.

When conducting the Pickering-Connick balancing test in *Cockrel*, the case upon which a good portion of the previous Appellate Court decision in this case was based, the Sixth Circuit balanced the school system's interest in workplace efficiency, harmony, and discipline against the teacher's interest in teaching her students about industrial hemp.[25] *Cockrel*, 270 F.3d at 1053-54. Although the Court determined that both of the parties' interests were important and recognizable, it ultimately concluded that the scale tipped in favor of the plaintiff, finding that it would be unfair to discipline the teacher for the disruptive consequences of her industrial hemp presentations when the school district had given her permission for such speech. *Id.* at 1054-55.

Thus, the Court, in this case, must determine whether any of the "speech" in dispute was pre-approved by the Defendants and, if so, what effect that has on the Pickering-Connick balance. As to three of the five materials in dispute-the *Heather* book and the two student-authored stories-there is no dispute that the school district *did not* give prior permission for the Plaintiff to present these to her class. Thus, the Defendants were justified in discip-

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[25] Hemp is a plant that produces both marijuana and fibers that can be used to make various goods, such as paper and clothes. *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1042 (6th Cir.2001). At the time of the *Cockrel* case, hemp was an illegal substance in Kentucky, although controversy surrounded the banning of this substance, because of the environmental benefit of using the industrial components of the hemp fibers as an alternative to the use of trees *Id* at 1042-43. The Court concluded that the teacher's speech concerning the use of industrial hemp "substantially involved matters of significant public concern in Kentucky." *Id.* at 1053.

lining her for such speech, to the extent they did, as a result of the Pickering-Connick balancing test.

The fourth item in question is the *Romeo and Juliet video*. The facts indicate that the school had given teachers general permission to show videos rated PG-13 and that this movie was rated PG-13. Doc. # 32, Ex. B at 20 (Video Rating Policy). The only objection the Plaintiff indicates with regard to this video is that she was required to omit a portion of the movie that contained nudity, when she showed it to her ninth grade English class.[26] Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 122 (explaining that she felt it important to show the nudity, so the students might be able to distinguish between the gratuitous display of nudity and art). While the general "preapproval" to show PG-13 videos would seem to indicate that this video would fall within the *Cockrel* rubric, the Court is reluctant to jump to that conclusion based on these alleged facts. The Plaintiff does not imply that her contract was not renewed because she chose to show the *Romeo and Juliet* video (that implication is made about the teaching of the other four materials, but not this video). Rather, the Plaintiff only complains that she was restricted from showing the entirety of the video. The Court does not read the

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[26] The Plaintiff also points out that the principal questioned her about the rating of the video, after she showed it to her students Doc. # 41 at 19, 31 It is unclear what the Plaintiff is implying by highlighting this point. The Court concludes that it was well within the province of a school principal to inquire of a teacher as to the rating of a video that she showed to her class, particularly in light of the fact that PG-13 videos had been preapproved for viewing, but videos with more mature ratings had not Since the Plaintiff does not expound on the importance of this fact, the Court will disregard it in drawing its conclusions herein.

Cockrel decision so broadly as to apply to these facts. Had the Board disciplined the Plaintiff after she showed the pre-approved video, *Cockrel* would apply. Instead, the administration regulated a portion of the "speech" prior to the Plaintiff's presentation of the same-a prior restriction rather than a later disciplinary measure. Reverting back to the previous analysis, the Court concludes that the Plaintiff had no "right" to show the entirety of the video simply because it fell within the general preapproval of all PG-13 videos. If the Board or its administrators felt it appropriate to excise certain parts of the video, because, for example it contained age inappropriate nudity, they had an interest in doing so that outweighed any interest the teacher had in presenting it. Thus, the Defendants were justified in restricting the Plaintiff's speech on this matter.

Finally, the Court turns to the Plaintiff's teaching of the book *Siddhartha*. Without a doubt, the Defendants gave the Plaintiff permission to teach this book, in that the District had purchased quantities of such several years before and made it available to teachers as an optional text. Therefore, based on the Sixth Circuit's instruction in *Cockrel*, the Court will not tip the scales in favor of the Defendants' stated interests in selecting and requiring adherence to its curriculum and efficiently administering the District, when it previously gave the Plaintiff permission to teach this book and then later allegedly disciplined her for so doing.

In sum, then, at this point in the analysis, the Court concludes that the Defendants' request for summary judgment is well taken, as to the Plaintiff's assertions that the Defendants disciplined her for exercising her First Amendment rights, with regard

to the teaching of *Heather Has Two Mommies*, the student-authored story about the rape, the student-authored story about the murder of the priest and the desecration of the crucifix, and the *Romeo and Juliet* video. However, the Plaintiff has satisfied the first element of her *prima facie* case, by demonstrating that she was engaged in constitutionally protected activity, as to her allegations pertaining to her teaching of the book *Siddhartha*. Therefore, the Court will now proceed with the remaining steps of the *prima facie* analysis, with regard to the Plaintiff's assertions regarding that book.

2. *Whether Defendants' Adverse Action Caused Plaintiff to Suffer Injury that would likely Chill Person of Ordinary Firmness from Continuing in Activity*

As was previously indicated, the Sixth Circuit has held that non-renewal of a teaching contract is "an injury that would likely chill a person of ordinary firmness from continuing in [the] activity." *Evans-Marshall*, 428 F.3d at 232 (quoting *Cockrel*, 270 F.3d at 1055). Thus, the Plaintiff has satisfied the second step of her *prima facie* case of First Amendment retaliation and the Court will turn to an analysis of the final step.

3. *Whether Plaintiff's Non-Renewal was Motivated at Least in Part as Response to Her Exercise of Constitutional Rights*

In order to satisfy the third element of her prima facie case, the Plaintiff must not rely simply on the fact that the non-renewal decision was made after she taught *Siddhartha*, but rather a preponderance of the evidence must link her teaching of that book with the Board's decision. *Cockrel*, 270 F.3d at 1055

(quotation omitted). Stated another way, the third element requires the Plaintiff to demonstrate that there is a "causal connection" between her teaching *Siddhartha* and her non-renewal. *Arnett v. Myers*, 281 F.3d 552, 560 (6th Cir.2002).

The Plaintiff has not concisely framed an argument in support of the third element of her *prima facie* case, so the Court will attempt to discern whether she has set forth sufficient evidence in support of the general arguments scattered throughout her brief, to create a genuine issue of material fact as to this issue.[27] Some of the facts that the Plaintiff alleges are tied to her teaching of *Siddhartha* have no link to that book except the temporal proximity of the events and, thus, are insufficient to support her argument.[28]

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[27] The first 27 pages of the Plaintiff's brief (Doc. # 41) contain a detailed explanation of the facts. The remaining 13 pages comprise her argument, wherein she ends her discussion of her *prima facie* case after the section devoted to whether her non-renewal would chill future expression, skipping the third step, to wit: whether the alleged adverse employment action was motivated at least in part as a response to the exercise of her constitutional rights. *See Id.* at 37.

[28] The Plaintiff also seems to be arguing that she was singled out by the Principal for unnecessary criticism and monitoring. For example, she argues that the Principal unfairly criticized her alternative book assignment selection for *Siddhartha* (which was a book appropriate for 9-12 year olds, whereas her ninth grade students were primarily 14-15 years old), as being too elementary. Doc. # 41 at 10 The Plaintiff also argues that Wray instructed her to check with a superior before using any potentially controversial materials in the future and that such a requirement was not imposed on other members of the English department faculty. *Id.* at 12. Because these facts would arguably support a claim of improperly *regulating* First Amendment speech (a claim that the Plaintiff has not made in her Complaint), rather than supporting her claim that the Board

E.g., Doc. # 41 at 3 (alleging that she received low marks on her performance evaluations after the public controversy ensued about various books); 8-9 (asserting that her relationship with Wray deteriorated after October Board meeting), 20 (suggesting that Plaintiff's lesson plans were not an issue until after the *Siddhartha* controversy). Some of the facts, however, possibly link the Plaintiff's teaching of *Siddhartha* to the Defendants' decision to not renew her teaching contract, to wit: Principal Wray stated at an English faculty meeting, immediately after the October Board meeting, that the Plaintiff was "on the hot seat" for parental complaints about *Siddhartha* and, further, according to the Plaintiff's testimony, Wray told her that he objected to her selection of Siddhartha, as well as to the discussions that went along with teaching the themes of that book.[29] Doc.

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did not renew her contract for the exercise of protected speech, the Court will not consider them in its analysis here.

[29] As to Wray objecting to her teaching *Siddhartha*, as well as to her method of teaching that book, the Plaintiff testified as follows.

> *Plaintiff* [Wray] verbally told me that . . . he didn't like that I had done the [100 most challenged book project]. He didn't like that I had chosen *Siddartha*. He doesn't like the discussions that go along with the themes in all of those books going on in class, and that he intended to reign it in.
>
> *Counsel* What discussions did he object to?
>
> *Plaintiff* Which book do you want to talk about?
>
> *Counsel* Pick one.
>
> *Plaintiff*: All right. Well, *Siddartha*, you're discussing issues of spirituality, Buddhism, romantic relationships, personal growth, familial relationships. We had discussions about all of that going on in class. Parents and Charles Wray objected.

Id. (Evans-Marshall Dep.) at 100-01.

31, Attach. # 1 (Evans-Marshall Dep.) at 64-65; 74-75, 100-01.

In response, the Defendants argue that, as to the "hot seat" comment, the Plaintiff has presented no evidence to suggest that Wray was upset with her when he made this comment; rather, the public concern expressed at the October Board meeting had placed Plaintiff on the "hot seat" and the principal's comment was one of fact, not animosity. Doc. # 44 at 3. In further support of this conclusion, the Defendants point out that Wray conducted an official written "observation" of the Plaintiff two weeks after the October Board meeting, in which he made no reference to the *Siddhartha* controversy and reflected only positive comments about the Plaintiff. Doc. # 31, Ex. C, pt. 2 at 5 (Nov. 13, 2001, Teacher Observation Log). Furthermore, despite the Plaintiff's allegations to the contrary, neither the Plaintiff nor the *Siddhartha* book were a point of any significant discussion at the November Board meeting; rather that meeting primarily focused on disgruntled parents' concerns over several junior high school library books.[30] Doc. # 37, Ex. # 1 (Nov. 26, 2001 Bd. Mtg. DVD; filed manually).[31] It was not until mid-December that

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[30] In the Complaint, the Plaintiff alleges as follows:

> At the November 26, 2001, Board meeting, approximately 100 parents were in attendance to protest the presence of materials in classes and school libraries that the parents thought obscene. . . . At the meeting, parents presented a petition of 500 signatures calling for decency in education. The focus of the parents' concern was subject matter presented in Plaintiff's classes.

Doc. # 1 ¶ 16

[31] The Defendants have filed manually with the Court a DVD of the November Board meeting. The Court has watched the

Wray was first critical of the Plaintiff, in his second "observation" of her for that school year and for reasons unrelated to *Siddhartha*. Doc. # 1 ¶ 17.

The Defendants further point to the fact that, contrary to the Plaintiff's unfounded assertions,[32] the administration consistently supported the Plaintiff's teaching of Siddhartha, as evidenced by Superintendent Zigler's comment at the October Board meeting noting that since the book was purchased by the District, its selection had nothing to do with an individual teacher. Doc. # 32, Attach. # 1 (Zigler Dep.) at 16-17. At that meeting and the November Board meeting, the Board also made it clear that it did not intend to pull the book from the curriculum, but offered parents the option of requesting an alternative reading assignment, if they desired. *Id.* at 23, 35, 67. The Defendants also point out that when questioned as to whether he or anyone else in the administration was aggravated with the Plaintiff for having made the Siddhartha assignment, Superintendent Zigler replied,

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entirety of this DVD and agrees with the Defendants' contention that this Board meeting was primarily focused on the junior high library book controversy. Only one parent made specific reference to the *Siddhartha* book, but not to the Plaintiff by name. This parent's main complaint was with the alternative book that had been assigned when requested, as being too elementary, that her daughter felt as if she had been punished for seeking an alternative assignment, and that the assignment for the alternative book was incomprehensible to both the student and the parent.

[32] As support for her assertion that Principal Wray told her that he did not support her choice of *Siddhartha*, nor her teaching methodologies therefor, the Plaintiff offers her own deposition testimony. *See* Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 64-65, 74-75, 100-01.

> Not at all. . . . [T]hese are our books, we've purchased these. I had a bigger issue with the middle school book that was brought up [at the Board meeting]. . . . [W]hat did we miss here that we couldn't make a better selection of more appropriate reading material for middle school kids? There are many books out there. But *Siddhartha* had been in the district for years.

Id. at 68. Furthermore, at least one other teacher had taught the book in previous years, apparently without incident. Doc. # 33, Attach. # 1 (Wray Dep.) at 53.

The Defendants continue their argument by pointing out that the Plaintiff's position is geared toward the principal's apparent stance on the *Siddhartha* assignment and controversy, but the Superintendent and the Board had to concur in the nonrenewal decision and the Plaintiff has offered no evidence to indicate that their concurrence in that decision was in any way motivated by that curricular choice. *See* Doc. # 32, Attach. # 1 (Zigler Dep.) at 90-94 (stating that it was his understanding that Wray's nonrenewal recommendation was not in any way motivated by Plaintiff's curricular decisions).

Upon consideration of the evidence pointed to by each of the parties, the Court concludes that the Plaintiff has not set forth a preponderance of the evidence that links her teaching of *Siddhartha* with the Board's decision to not renew her contract.[33] *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036,

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[33] This is another way of saying that the Court has construed the evidence most strongly in favor of the Plaintiff and has concluded that there is no genuine issue of material fact, as to this issue.

1055 (6th Cir.2001) ("[T]o survive defendants' motion for summary judgment, [the plaintiff] must present sufficient evidence to allow a reasonable factfinder to conclude, by a preponderance of the evidence, that her speech, at least in part, motivated the defendants to discharge her."). On the contrary, the evidence leans decidedly the other way, in indicating that the non-renewal decision was in no way motivated by the Plaintiff's teaching of *Siddhartha*.

Because the Plaintiff has not set forth a genuine issue of material fact as to her *prima facie* case of First Amendment retaliation, the Defendants' Motion for Summary Judgment (Doc. # 38) is SUSTAINED. Based on the Court's decision herein, it is unnecessary for the Court to address the issue of qualified immunity.

IV. CONCLUSION

The Defendants' Motion for Summary Judgment (Doc. # 38) is SUSTAINED. Judgment is to be entered on behalf of the Defendants and against the Plaintiff.

The above captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

APPENDIX D

UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT

No. 04-3524

SHELLEY EVANS-MARSHALL,
Plaintiff-Appellee,

v.

BOARD OF EDUCATION OF THE TIPP CITY EXEMPTED VILLAGE SCHOOL DISTRICT; CHARLES W. WRAY, individually; and JOHN T. ZIGLER, individually,
Defendants-Appellants.

Argued: April 25, 2005.
Decided and Filed: Nov. 1, 2005.

Before: COLE and SUTTON, Circuit Judges; ZATKOFF, District Judge.*

COLE, J., delivered the opinion of the court.

SUTTON, J. (pp. 233 - 238), delivered a separate concurring opinion.

ZATKOFF, D.J. (pp. 238 - 240), delivered a separate opinion concurring in part and dissenting in part.

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* The Honorable Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

COLE, Circuit Judge.

This is a civil rights case brought under 42 U.S.C. § 1983. Plaintiff-Appellee Shelley Evans-Marshall, a public high school teacher, filed a complaint against Defendants-Appellants, the Board of Education of Tipp City Exempted Village School District; John T. Zigler, the Superintendent of the Tipp City Schools; and Charles W. Wray, the principal of Tippecanoe High School, a high school in the Tipp City school district. Evans-Marshall argues that Zigler and Wray, in recommending the non-renewal of her teaching contract, retaliated against her for exercising her rights under the First Amendment. The Defendants-Appellants filed a motion to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Upon denial of the motion, the Defendants-Appellants have lodged this interlocutory appeal. For the following reasons, this Court AFFIRMS the judgment of the district court.

I. Factual Allegations and Background

According to the allegations of the Complaint, Shelley Evans-Marshall is a certified high school teacher and a former employee of the Board of Education of Tipp City Exempted Village School District (the "Board"), located near Dayton, Ohio. Evans-Marshall was hired by the Board to teach language arts to high school students at Tippecanoe High School, and to advise the high school literary magazine for the 2000-2001 school year. During her employment, Evans-Marshall's direct supervisor was the principal of Tippecanoe High School, Charles W. Wray.

Throughout the 2000-2001 school year, Evans-Marshall received periodic evaluations from Wray. On January 4, 2001, her evaluation had six ratings of outstanding, fifteen ratings of satisfactory, and no unsatisfactory ratings. On April 10, 2001, she received five ratings of outstanding, sixteen ratings of satisfactory, and no unsatisfactory ratings. At the end of the school year, Evans-Marshall's teaching and literary magazine contracts were renewed.

On October 22, 2001, approximately twenty-five parents attended a public meeting of the Board of Education of the Tipp City Schools to "express concerns about the appropriateness and merit of some materials that had been assigned to the students as optional reading." The next day, Wray told Evans-Marshall, in front of the school's English teachers, that she was on the "hot-seat" because parents complained at the Board meeting about Evans-Marshall's assignment of the book *Siddhartha* to her students. Shortly thereafter, Evans-Marshall was evaluated for the first time for the 2001-2002 school year, and received no negative comments.

At the next Board meeting, held on November 26, 2001, public criticism of Evans-Marshall intensified. According to the Complaint, "approximately 100 parents were in attendance to protest the presence of material in classes and school libraries that the parents thought obscene." A petition was also presented with about 500 signatures that called for "decency in education." According to Evans-Marshall, the focus of the parents' concern was the subject matter presented in her classes.

Several weeks after the November 26 meeting, Wray formally observed Evans-Marshall in her classroom. Following the observation, Wray, for the

first time, gave Evans-Marshall negative comments concerning her performance. He also provided her with instructions: "Any material containing graphic violence, sexual themes, profanity, suicide, drugs and alcohol need [sic] to be discussed with your department chairs before being used in class." Evans-Marshall responded to the instruction in writing. She noted that the materials used in her class were the novels *Fahrenheit 451*, *To Kill a Mockingbird*, and *Siddhartha*, that none of these books had any inappropriate themes, and that each book "had been purchased and approved by the Board."

Evans-Marshall's first written evaluation following the November 26 meeting was notably more critical than previous evaluations. On January 10, 2002, Wray rated Evans-Marshall as "unsatisfactory on 4 criteria, outstanding on only 2 criteria, and satisfactory on 15 performance criteria." Wray further commented that "Use of material that is pushing the limits of community standards through graphic violence and sexual overtones has created a negative image in the community . . . . Continued to use or tried to use material that was questionable after being told to get such material reviewed by department chairpersons or the principal."

On March 11, 2002, Evans-Marshall showed her class *Romeo + Juliet*, a movie adaptation of the Shakespeare play. Wray observed the class again and asked Evans-Marshall about the rating of the movie. Evans-Marshall informed him that it was rated PG-13. According to the Complaint, prior approval is not required to show movies rated PG-13.

On March 21, 2002, Evans-Marshall received her second written evaluation since the November 26 meeting; it was also very critical. Evans-Marshall "received 5 ratings of unsatisfactory, one rating of outstanding, and 15 ratings of satisfactory." Wray made the following comment in writing: "The evaluation from the first part of the year addressed several areas of concern that has [sic] arisen this year. There have been improvements but not enough to recommend a continuing contract."

Superintendent Zigler recommended the non-renewal of Evans-Marshall's contract at the Board's meeting on March 25, 2003. In accordance with Zigler's recommendation, the Board unanimously passed a motion not to renew Evans-Marshall's contract, and hired a replacement teacher. Evans-Marshall made various attempts to challenge the dismissal, all of which were denied by the Board.

Evans-Marshall brought suit in federal court under 42 U.S.C. § 1983, seeking injunctive relief and damages. She alleges that she was terminated in "retaliation for the curricular and pedagogical choices she made while teaching at Tippecanoe High School and the exercise of rights under the First Amendment." Evans-Marshall seeks recovery against the Board, as well as Wray and Zigler.

The Defendants-Appellants moved to dismiss the Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court denied the motion; this timely appeal ensued.

II. Analysis of Retaliation Claim

A. Standard of Review and Elements of Retaliation

On a Rule 12(b)(6) motion, we construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the pleader. *Rossborough Mfg. Co. v. Trimble*, 301 F.3d 482, 489 (6th Cir.2002); *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 677 (6th Cir.2001); *see also* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5B FEDERAL PRACTICE AND PROCEDURE § 1357 at 417 (3d ed.2004). Claims under 42 U.S.C. § 1983 "are not subject to heightened pleading standards." *Memphis, Tenn., Area Local, Am. Postal Workers Union, AFL/CIO v. City of Memphis*, 361 F.3d 898, 902 (6th Cir.2004). Therefore, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). "If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). Claims lacking factual merit are properly dealt with through summary judgment under Rule 56. *Id.* This is because, under the notice pleading standard of the Federal Rules, courts are reluctant to dismiss colorable claims which have not had the benefit of factual discovery. *See Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of

pleading is to facilitate a proper decision on the merits."). A motion to dismiss "should not be granted 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir.1976) (citing *Conley*, 355 U.S. at 45-46, 78 S.Ct. 99).

In this case, Evans-Marshall claims she was terminated due to activities protected under the First Amendment. Accordingly, she must allege the following elements in order to establish a constitutionally protected right for the purposes of qualified immunity:

> (1) that [she] was engaged in a constitutionally protected activity; (2) that the defendant's adverse action caused [her] to suffer an injury that would likely chill a person of ordinary firmness from continuing in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of [her] constitutional rights.

Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1048 (6th Cir.2001). If these elements are satisfied, the defendants may rebut the claim by establishing, by a preponderance of the evidence, that "they would have taken the same action even in the absence of the protected conduct." *Id.* (internal quotes and citation omitted).

B. Whether the Activity Was Constitutionally Protected

In considering the first element of First Amendment retaliation-whether a state-employed teacher's in-class speech is constitutionally protected by the First Amendment-this Court has consistently applied

the balancing test announced in *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), *and refined in Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). *See Cockrel*, 270 F.3d at 1055 n. 7 (citing cases); Hardy, 260 F.3d at 678; *Bonnell v. Lorenzo*, 241 F.3d 800, 811-12 (6th Cir.2000); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1185 (6th Cir.1995).

Under that familiar test, we first determine whether Evans-Marshall's activity constitutes "speech" within the meaning of the First Amendment. *See Cockrel*, 270 F.3d at 1048. If Evans-Marshall's activity was "speech," she must show: (1) that she "was disciplined for speech that was directed toward an issue of public concern"; and (2) that her "interest in speaking as [she] did outweighed the [school's] interest in regulating [her] speech." *Hardy*, 260 F.3d at 678 (citing *Pickering*, 391 U.S. at 574, 88 S.Ct. 1731); *Cockrel*, 270 F.3d at 1050 (same). In determining whether speech is on a matter of public concern, we look to the "content, form, and context of a given statement, as revealed by the whole record." *Hardy*, 260 F.3d at 678 (citing *Connick*, 461 U.S. at 147-48, 103 S.Ct. 1684). As to the content of the speech, "so long as the speech relates to matters of 'political, social, or other concern to the community,' as opposed to matters 'only of personal interest,' it shall be considered as touching upon matters of public concern." *Cockrel*, 270 F.3d at 1052 (citing *Connick*, 461 U.S. at 146-49, 103 S.Ct. 1684).

The concurrence would reexamine our application of *Pickering* to in-class curricular speech because "[t]he Supreme Court has never held that the First Amendment applies to a teacher's classroom speech, and there is good reason to think it would not do so."

Conc. ¶ 6. Of greater relevance is that the Supreme Court has never removed in-class speech from its presumptive place within the ambit of the First Amendment. *See Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 415-16, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979) ("The First Amendment forbids abridgment of the 'freedom of speech.' *Neither the Amendment itself nor our decisions indicate that this freedom is lost* to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public.") (emphasis added).

Moreover, the Supreme Court has characterized the proposition that "students and teachers do not shed their constitutional rights to freedom of speech and expression at the schoolhouse gate" as "the unmistakable holding of [the] Court for almost 50 years." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). *See also Pickering*, 391 U.S. at 568, 88 S.Ct. 1731 ("[T]eachers may [not] constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest."); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-06, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967) ("[T]he theory that public employment . . . may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."). The assumption that the Court would draw a distinction between the schoolhouse gate and the doors of the classroom is counterintuitive. *See id.* at 683 ("The classroom is peculiarly the 'marketplace of ideas.'"); *Hardy*, 260 F.3d at 671 ("In light of [Supreme Court] precedent, the argument that teachers have no First Amendment rights when

teaching, or that the government can censor teacher speech without restriction, is totally unpersuasive.").

In any event, applying *Pickering* pursuant to *Cockrel*, the district court held that dismissal of the individual defendants was inappropriate:

> [T]aking the facts in Plaintiff's Complaint as true and giving her the benefit of every reasonable inference to be drawn therefrom, it is clear that her assignment of certain books to her students constitutes speech, that the Complaint does not, upon its face, sufficiently detail the subject matter of the allegedly offensive books sufficiently to allow this Court to determine whether they touch upon matters of public concern and, further, that this Court cannot undertake the balancing test required by [*Pickering*] based upon the Complaint alone. Moreover, a reasonable inference to be drawn as pled by the Plaintiff, if accepted by the trier of fact, may lead it to conclude that the decision to terminate her was based, at least in part, upon her decision to assign the books in question.

Dist. Ct. Dec. at 2. We conclude that this decision was not in error.

1. Teaching as Speech

As an initial matter, the activity at issue is "speech" for the purposes of the First Amendment. In this case, the disputed materials-three well-respected novels and a movie adaptation of a Shakespeare play-are clearly protected by the First Amendment. *See Metzger v. Peracy*, 393 F.2d 202, 204 (7th Cir.1968) ("Motion pictures, like books, are protected by the constitutional guarantees of freedom of speech and press."). Furthermore, our precedent establishes

that the assignment by a public school teacher of protected materials is itself "speech" within the meaning of the First Amendment. *See Cockrel*, 270 F.3d at 1049 (holding a teacher's sponsorship of an in-class speaker on industrial hemp was speech, despite the lack of a "particularized message" such as "advocating or speaking against hemp's use as an environmental alternative to cutting down trees"); *Stachura v. Truszkowski*, 763 F.2d 211, 214-15 (6th Cir.1985) (holding that a teacher's in-class use of movies on sexual maturity is protected by the First Amendment), *rev'd on other grounds by Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 304-05, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986).

Relying on *Fowler v. Board of Education*, 819 F.2d 657 (6th Cir.1987) (single-judge opinion), the individual defendants argue that the assignment of the disputed materials is not "speech" and that the allegations of the Complaint do not establish an advocative or expressive purpose in the assignment of the various literary works. *Id.* at 662-64 (Milburn J., concurring) (holding that the in-class showing of a movie on a non-instructional day was not speech since the teacher conceded she had no curricular, communicative, or expressive intent). However, as we have recently noted, Fowler is a single-judge opinion and as such not binding on this Court. *See Cockrel*, 270 F.3d at 1049-50. Furthermore, the two remaining judges on the *Fowler* Court concluded that the showing of the movie was speech for the purposes of the First Amendment. *See id.* (citing *Fowler*, 819 F.2d at 667, 669-70).

2. A Matter of Public Concern

Having determined that the Complaint alleges activity sufficient to be considered "speech," Evans-Marshall must now establish by allegation that the speech is constitutionally protected. To do this, Evans-Marshall must allege sufficiently that her speech "touched on a matter of public concern." *Cockrel*, 270 F.3d at 1050.

In the Complaint, Evans-Marshall contends that her termination "was retaliation for the curricular and pedagogical choices she made while teaching at Tippecanoe High School and the exercise of rights under the First Amendment." Evans-Marshall specifies that she assigned the books *Siddhartha*, *Fahrenheit 451*, and *To Kill a Mockingbird*, and the movie *Romeo + Juliet*, to an upper-level high school language art class. Under Rule 12(b)(6), we must resolve all reasonable inferences in favor of the plaintiff. *Rossborough Mfg. Co.*, 301 F.3d at 489. We draw the reasonable inference that Evans-Marshall taught the main themes of the work she assigned. For instance, in teaching *To Kill a Mockingbird*, it is reasonable to infer that Evans-Marshall taught the themes of race and justice in the American South. Such content is clearly a matter of public concern. *See Cockrel*, 270 F.3d at 1052; *Hardy*, 260 F.3d at 679 (noting that "race, gender, and power conflicts in our society" are "matters of overwhelming public concern"). The same can be said of the other disputed works: spirituality (*Siddhartha*), the intersection of love and politics, (*Romeo + Juliet*), and, of course, government censorship of books (*Fahrenheit 451*).

3. The Balancing Test

Having established that Evans-Marshall's speech was of public concern, we now balance the speech against the interests of the Board. The individual defendants identify a host of factors that support "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731. The individual defendants argue that Evans-Marshall was terminated for insubordination, lack of communication, and lack of teamwork, and not for her First Amendment activity. The individual defendants then note that the Board has a statutory duty to control the curricular and pedagogical choices of its teachers. *See* Ohio Rev. C. § 3313.60(A) (2005) ("The board of education of each city and exempted village school district . . . shall prescribe a curriculum for all schools under their control."). Finally, the individual defendants note that the Board may limit curricular speech with which it does not agree. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272-73, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (holding that student speech in a school newspaper is subject to reasonable regulations by principal).

The individual defendants have not shown that the allegations and reasonable inferences therefrom fail to establish "any set of facts that could be proved consistent with the allegations." *Hishon*, 467 U.S. at 73, 104 S.Ct. 2229. The claim that Evans-Marshall's termination was for non-retaliatory reasons cannot be considered without some factual discovery. On a motion to dismiss, we are required to assume the plaintiff's factual allegations to be true. *See Rossborough Mfg. Co.*, 301 F.3d at 489. Here, Evans-Marshall alleges that the Board's reasons for termi-

nation were merely a pretext for retaliation. This is supported by factual allegations that Evans-Marshall received negative job evaluations due to criticism from the community related to the alleged speech, and not due to her employment performance. Such allegations are sufficient to survive a motion to dismiss.

Regarding control of the curriculum and disassociation with objectionable speech, our precedent is instructive. We have previously concluded that the prior approval of controversial speech by the school or the Board undercuts the interests of the state in controlling the workplace. *See Cockrel*, 270 F.3d at 1054-55 ("[W]e cannot allow [concerns of harmony, efficiency, and discipline] to tilt the Pickering scale in favor of the government . . . when the disruptive consequences of the employee speech can be traced back to the government's express decision permitting the employee to engage in that speech."); *see also Stachura*, 763 F.2d at 214-15.

Evans-Marshall alleges that the three novels "had been purchased and approved by the Board." Furthermore, the movie used in class was rated PG-13, and according to Evans-Marshall, could be shown without prior approval. Nonetheless, after a public outcry related to the use of the disputed materials, Evans-Marshall alleges that she was criticized publicly by Wray, received negative evaluations for the first time, and was eventually terminated. Such allegations are sufficient to establish protected First Amendment activity under the *Pickering* test, at least for the purposes of a motion to dismiss.

C. The Remaining Elements of Retaliation

Evans-Marshall's allegations also satisfy the remaining elements of a First Amendment retaliation claim. Specifically, non-renewal is "an injury that would likely chill a person of ordinary firmness from continuing in [the] activity." *Cockrel*, 270 F.3d at 1048, 1055. As noted above, Evans-Marshall adequately alleges that her non-renewal "was motivated at least in part as a response to the exercise of her free speech rights." *Id.* at 1055.

As to the rebuttal of the individual defendants, our inquiry is again limited by the early stage of this case. Assuming, as we must, that the allegations of the Complaint are true, and without the benefit of factual discovery, the individual defendants cannot show that "they would have taken the same action even in the absence of the protected conduct." *Id.* at 1048. Indeed, Evans-Marshall alleges that the public outcry related to her protected First Amendment activity was the motivating factor behind her termination.

III. Analysis of Qualified Immunity

The individual defendants also raise a qualified immunity defense as a basis for their Rule 12(b)(6) motion. We engage in a two-step process for determining whether a state actor is entitled to qualified immunity. First, whether "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer[s'] conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Second, "if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established."

Id. We review de novo the question of qualified immunity on a motion to dismiss. *Hardy*, 260 F.3d at 677.

Evans-Marshall has made allegations sufficient to satisfy the first prong of qualified immunity, that "the officer[s'] conduct violated a constitutional right[.]" *Saucier v. Katz*, 533 U.S. at 201, 121 S.Ct. 2151. Since the Complaint adequately alleges a claim of First Amendment retaliation, there are sufficient allegations to support a claim that the individual defendants violated Evans-Marshall's constitutional rights by terminating her. *See Hardy*, 260 F.3d at 682 (noting that first prong of qualified immunity is met when First Amendment retaliation is adequately alleged).

Evans-Marshall's claim also satisfies the second prong of qualified immunity, that "the right was clearly established." *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151. Under a liberal reading of the Complaint, Evans-Marshall was terminated due to a public outcry engendered by the assignment of protected material that had been approved by the Board. Such a claim dovetails with previous, meritorious claims in this circuit. *See Cockrel*, 270 F.3d at 1054-55; *Stachura*, 763 F.2d at 214-15.

The dissent calls our attention to the comments by several of our sister circuits to the effect that constitutional rights discovered only pursuant to a balancing of interests have special implications for qualified immunity. The First Circuit, for instance, has expressed concern that "when the law requires a balancing of competing interests, it may be unfair to charge an official with knowledge of the law in the absence of a previously decided case with clearly analogous facts." *Borucki v. Ryan*, 827 F.2d 836, 848

(1st Cir.1987); *see also Myers v. Morris*, 810 F.2d 1437, 1462 (8th Cir.1987) (holding that a right subject to a balancing test "can rarely be considered 'clearly established,' at least in the absence of closely corresponding factual and legal precedent").

Yet *Cockrel* is clearly analogous to the facts at bar. In *Cockrel*, a teacher was fired because of a public outcry over material she presented in class that had been approved by the school. 270 F.3d at 1045. We held that her presentation of material in class constituted speech that dealt with a matter of public interest. *Id.* at 1053. We assumed that the concerns of the school did not outweigh Cockrel's interest in speaking because the school had approved the very material that gave rise to the disruption. *Id.* at 1054-55. Even were this circuit to adopt the reasoning of some of our sister circuits, surely the fact that Evans-Marshall assigned books, whereas *Cockrel* brought in a guest lecturer about industrial hemp, does not obscure the constitutional right at issue.

IV. The Municipal Defendant

The Board also appeals the district court's denial of the motion to dismiss. However, an exercise of jurisdiction over a municipal defendant after the denial of a motion to dismiss is ordinarily improper. Under the collateral order doctrine, "an order rejecting the defense of qualified immunity at either the dismissal stage or the summary judgment stage is a 'final' judgment subject to immediate appeal." *Behrens v. Pelletier*, 516 U.S. 299, 307, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996); *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) ("[W]e hold that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the

meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment."). Qualified immunity only extends to "government officials performing discretionary functions." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *Barrett v. Steubenville City Sch.*, 388 F.3d 967, 970 (6th Cir.2004). Accordingly, the district court's denial of the motion to dismiss is an appealable final order as applied to the individual defendants—Wray and Zigler—but not the municipal defendant—the Board.

In any event, the district court's denial of the motion to dismiss the Board was not in error. As noted above, the allegations of the Complaint and the reasonable inferences therefrom are sufficient to support that Evans-Marshall engaged in constitutionally protected activity. The Board's approval of Evans-Marshall's termination is an injury that would chill First Amendment expression. Evans-Marshall also specifically alleges that the Board's decision was at least partly motivated by the protected activity. As with the individual defendants, the Board's rebuttal that the termination was for legitimate, non-discriminatory reasons cannot be considered without some factual discovery.

V. Conclusion

For these reasons, this Court AFFIRMS the judgment of the district court.

SUTTON, Circuit Judge, concurring.

I concur in Judge Cole's opinion, which accurately follows our cases and this complaint where they lead us. I write separately to explain what is (and what is not) at issue in this case, why our cases compel the rejection of the defendants' motion to dismiss the complaint for failure to state a claim and why this

case illustrates to me that our circuit should re-examine its First Amendment jurisprudence in the context of in-class curricular speech.

First, whatever else Evans-Marshall may complain about when it comes to the school district's oversight of her curricular choices in teaching high school English, she may not complain about the school district's infringement of her free-speech rights when it came to the assignment of *To Kill a Mockingbird*, *Siddhartha* and *Fahrenheit 451*. These books, quite understandably, appeared on the school district's list of books approved for high school English. When Evans-Marshall asked her students to read these classics, it thus was not her speech that was at issue but the school district's. And, indeed, her complaint never says that the school district based its decision to terminate her on the ground that she taught books that the school district said she could. What her complaint does say is that the school district terminated her based on the *methods* she used in teaching these books and in discussing them in class.

Second, our case law permits such a cause of action, allowing primary and secondary public school teachers to bring a First (and Fourteenth) Amendment retaliation claim in response to a termination decision arising from their methods of teaching and from their in-class curricular speech. Like the court today, I can find no ground at this early stage in the litigation to distinguish *Cockrel v. Shelby County School District*, 270 F.3d 1036 (6th Cir.2001), which held that a fifth-grade teacher had a First Amendment right to invite an actor into her classroom to give a presentation about industrial hemp. *Id.* at 1055. No principled distinction exists between an in-class presentation by a visiting speaker, which is one

method of teaching, and an in-class discussion of reading materials, which is another. And no principled distinction exists between the matter of public concern at stake in *Cockrel* (the virtues of industrial hemp) and the themes of racial justice, spiritual awakening and government censorship that Evans-Marshall discussed while teaching *To Kill a Mockingbird*, *Siddhartha* and *Fahrenheit 451*.

Given our case law, the path that Judge Cole has taken in resolving this dispute is the path that has been charted for us. And that is all the more true when one accounts for the balancing test that governs these claims and for the preliminary stage of this litigation. Our cases first ask whether the teacher's speech "touches on a matter of public concern." *See Cockrel*, 270 F.3d at 1053. They then ask whether "the employee's interest in speaking" outweighs "the employer's interest in regulating the speech" to determine if the speech is constitutionally protected. *Id.*; *see Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). In the absence of discovery concerning why the teacher spoke and why the school district restricted her speech, it is difficult to understand how a court has any choice but to deny a motion to dismiss premised on the contention that no constitutional violation occurred.

Individual defendants likewise will only rarely be able to establish that the right was not "clearly established" at this stage of the dispute. The case-by-case, incremental decisionmaking of balancing tests, it is true, infrequently will provide the "fair notice" that qualified-immunity precedent requires, as each case may contain unique employee interests in

speaking and unique employer concerns in restricting the speech. *See Brosseau v. Haugen*, 543 U.S. 194, 125 S.Ct. 596, 599, 160 L.Ed.2d 583 (2004) (noting that, unless the case is an "obvious one" or "clearly established" in a "particularized sense," "fair warning" for qualified immunity cannot be found in "general tests"); *Lyons v. City of Xenia*, 417 F.3d 565, 579-80 (6th Cir.2005). But just as these considerations frequently will make it difficult for a plaintiff to surmount a qualified-immunity defense *after discovery*, so they make it difficult for a defendant to claim qualified immunity on the pleadings *before discovery* and before the parties (much less the courts) know what is being balanced against what. *See McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir.2004); *Jacobs v. City of Chicago*, 215 F.3d 758, 774-76 (7th Cir.2000) (Easterbrook, J., concurring); *see also Behrens v. Pelletier*, 516 U.S. 299, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996). Absent any factual development beyond the allegations in a complaint, a court cannot fairly tell whether a case is "obvious" or "squarely govern[ed]" by precedent, which prevents us from determining whether the facts of this case parallel a prior decision or not.

Third, while I am prepared to accept these conclusions in this case, I respectfully believe that our circuit should re-think the way it has applied *Connick* and *Pickering* to in-class curricular speech. The Supreme Court has never held that the First Amendment applies to a teacher's classroom speech, and there is good reason to think that it would not do so. In *Connick*, the Court said that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest, absent the most unusual circumstances, a federal court is not the appropriate

forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." 461 U.S. at 147, 103 S.Ct. 1684. *Connick*, then, draws two dichotomies: (1) between speech by public employees acting as "employees" and speech by public employees acting as private "citizens"; and (2) between speech "on matters of public concern" and speech "upon matters of personal interest." When public school teachers speak as "employees," even when they speak on "matters of public concern," the First Amendment thus does not protect their speech under *Connick*, a conclusion that respects the reality that it is the employer (not the employee) who bears ultimate responsibility for what goes on in the classroom, the reality that virtually all speech by public school teachers in the classroom involves speech in the teacher's capacity as an employee and the reality that many public school teachers (consider English, History and Government teachers) speak about "matters of public concern" virtually every day of the school year. Only when teachers speak as private citizens on matters of public concern does the First Amendment and the *Pickering* balancing test apply.

When, by contrast, teachers "speak in the course of carrying out their routine, required employment obligations, they have no personal interest in the content of that speech." *Ceballos v. Garcetti*, 361 F.3d 1168, 1189 (9th Cir.2004) (O'Scannlain, J., concurring), *cert. granted*, 543 U.S. 1186, 125 S.Ct. 1395, 161 L.Ed.2d 188 (2005). The school district bears responsibility for the speech, and for First Amendment purposes it therefore is the speaker and it therefore has the right to retain control of the speech-or, more precisely, to retain control over what is being taught in the classroom. *See id.*; *cf. Rust v. Sullivan*, 500

U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (holding that "[w]hen the government appropriates public funds to promote a particular policy of its own," it may "say what it wishes" and "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee").

To my knowledge, no other circuit has applied the *Pickering* balancing test to in-class speech of this sort. Some circuits have adopted the analysis that I have outlined above. *See Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir.1998) ("[A] public university professor does not have a First Amendment right to decide what will be taught in the classroom."); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 366 (4th Cir.1998) (en banc) (holding that "a public high school teacher [does not have] a First Amendment right to participate in the makeup of the school curriculum through the selection and production of a play"); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 795 (5th Cir.1989) (holding that "the first amendment does not vest public school teachers with authority to disregard established administrative mechanisms for approval of reading lists"). And some circuits have extended the Supreme Court's more lenient test for assessing student in-class speech, *see Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), to teacher in-class speech, though to my knowledge none of these circuits has upheld a First Amendment claim in this area. *See Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 719 (8th Cir.1998) (holding that "a school district does not violate the First Amendment when it disciplines a teacher for

allowing students to use profanity . . . in their written work"); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 724 (2d Cir.1994) (holding that a teacher does not have a "First Amendment right to use a film-clip showing bare-breasted women in a lecture to a tenth-grade mathematics class"); *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir.1993) (analyzing teacher in-class speech under the *Hazelwood* standard); *Bishop v. Aronov*, 926 F.2d 1066, 1074 (11th Cir.1991) (holding that "the University's interests in the classroom conduct of its professors are sufficient . . . to warrant the reasonable restrictions it has imposed" on a professor and that "[t]he University must have the final say in such a dispute"); *Miles v. Denver Pub. Sch.*, 944 F.2d 773 (10th Cir.1991) (holding that a school board may regulate a teacher's in-class speech); *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1008 (7th Cir.1990) ("Given the school board's important pedagogical interest in establishing the curriculum and legitimate concern with possible establishment clause violations, the school board's prohibition on the teaching of creation science to junior high students was appropriate."). Two circuits, it is true, have applied *Pickering* in what could be described as educational settings. *See Goldwasser v. Brown*, 417 F.2d 1169 (D.C.Cir.1969) (applying *Pickering* to government employee terminated because of the manner in which he taught foreign service officers); *Nicholson v. Bd. of Educ. Torrance Unified Sch. Dist.*, 682 F.2d 858 (9th Cir.1982) (applying *Pickering* to teacher terminated because of decisions he made as the high school's newspaper advisor). But both cases fail to address pure in-class curricular speech by a primary or secondary school teacher, and both cases at any rate rejected the claims. Contrary to the suggestion of

the majority opinion, *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979), does not establish any presumptions about how to handle the First Amendment implications of in-class speech but instead deals with private comments between a teacher and principal made outside of class.

Not only do the terms of the *Connick* inquiry support the position that localities should be able to determine what teachers may (and may not) say in class, so also does the Supreme Court's tradition of deferring to local school boards with regard to educational matters. "In the First Amendment arena and other arenas as well, the Supreme Court [ ] has frequently emphasized that public schools have considerable latitude in fashioning rules that further their educational mission." *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 393 (6th Cir.2005). "The very complexity of the problems of . . . managing a statewide public school system suggests that there will be more than one constitutionally permissible method of solving them," *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (quotations omitted), which is why "the determination of what manner of speech in the classroom . . . is inappropriate properly rests with the school board rather than with the federal courts," *Hazelwood*, 484 U.S. at 267, 108 S.Ct. 562 (citation and quotations omitted); *cf. Sweezy v. New Hampshire*, 354 U.S. 234, 255, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957) (Frankfurter, J., concurring) (noting that a university should "determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study"); *Boring*, 136 F.3d at 371 (Wilkinson, J., concurring) ("Traditionally, indeed for most of our history, educa-

tion has been largely a matter of state and local concern."). As today's case illustrates, our circuit's decisions in this area risk "remov[ing] from students, teachers, parents, and school boards the right to direct their educational curricular through democratic means. The curricular choices of the schools should be presumptively their own-the fact that such choices arouse deep feelings argues strongly for democratic means of reaching them." *Boring*, 136 F.3d at 371-72.

No less importantly, this approach accords with the realities of the classroom. To say that the First Amendment applies to classroom speech-and, as here, to the methods by which teachers teach their courses-is to say that the provision applies to almost everything a teacher does from the first ring of the school bell to the last. Vital as the free-speech guarantee is to American government, no school operates *solely* on Justice Holmes' premise that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting). Only a structured curriculum permits each school to advance its educational mission, which includes the assignment and discussion of works in class-the very activities about which Evans-Marshall complains and over which she claims a First Amendment interest. A school may, for the most simple reasons or the most complex, prefer Shakespeare to *Siddhartha* or Faulkner to *Fahrenheit 451*. A school may prefer that the books be taught sequentially, believing that *To Kill a Mockingbird* is appropriate for 13-year-olds but that *Siddhartha* becomes appropriate only a few years after that. A school may prefer that its teachers discuss certain themes from literary works, and not others, in the time allocated for each class. And a

school may believe certain materials or themes not appropriate for young children, preferring them to be brought out at a later point in a child's development.

Taken seriously, however, the application of the free-speech guarantee to in-class curricular speech not only undermines these basic assumptions about the management of our schools but also risks transforming many employment disputes into First Amendment retaliation claims. What terminations arising from an employee's *method* of teaching will not involve speech or, as Evans-Marshall puts it, "academic freedom"? May a teacher claim that a school board's requirement that the teacher discuss certain materials in class impermissibly compels his speech? *Cf. West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). May a teacher insist on assigning materials that some may perceive as racist and insist on discussing them when the school board has told him not to? May a teacher raise a controversial topic (say, intelligent design) when a school board has told him not to? May a teacher insist on introducing mature sexual themes when discussing a work of literature when a school board has told him not to? Does a music teacher retain veto power over that most controversial of school productions—the Holiday Concert? And in the end does every disagreement in this area "plant the seed of a constitutional case"? *Connick*, 461 U.S. at 149, 103 S.Ct. 1684.

It is precisely because "one man's vulgarity is another's lyric," *Cohen v. California*, 403 U.S. 15, 25, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), that parents long have insisted that school boards and school administrators retain control over the curriculum and the methods of teaching it to their impressiona-

ble children. Permitting federal courts to distinguish classroom vulgarities from lyrics or to decide whose method of teaching *Siddhartha* is superior—the school district's or Evans-Marshall's—not only disenfranchises the 9,000 or so members of the Tipp City community but also tests the boundaries of judicial competence. If even the most happily married parents cannot agree on what and how their own children should be taught, as I suspect is not infrequently the case, what leads anyone to think the federal judiciary can answer these questions? Submitting issues of this sort to the federal courts is not a sensible way to make decisions about the books that children read in public school or about the way books are taught in school, and it is not something that the Constitution mandates Because it is the method that our circuit's case law appears to have adopted, however, I respectfully concur in today's opinion.

ZATKOFF, District Judge, concurring, in part, and dissenting, in part.

I concur in Judge Cole's majority opinion, which faithfully applies this circuit's precedent in *Cockrel v. Shelby County School District*, 270 F.3d 1036 (6th Cir.2001) to the present facts. In addition, I concur in Judge Sutton's concurring opinion, which calls for a re-examination of this circuit's First Amendment jurisprudence regarding in-class curricular speech. I disagree with the majority insofar as it would deny qualified immunity to the individual defendants. Because I find that the alleged Constitutional violation was not "clearly established," I would grant qualified immunity to the individual defendants. Accordingly, I respectfully dissent as to this issue.

Government officials performing discretionary functions are shielded from liability for civil damages so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The Supreme Court has repeatedly "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). The issue of qualified immunity is a question of law. *Harlow*, 457 U.S. at 818, 102 S.Ct. 2727. The burden is on the plaintiff to demonstrate that the individual defendants are not entitled to qualified immunity. *See Wegener v. Covington*, 933 F.2d 390, 392 (6th Cir.1991).

The majority opinion extensively analyzed the issue of whether Plaintiff's complaint asserted a constitutional violation. Following Sixth Circuit cases, it applied the *Pickering* balancing test, weighing the employee's interest in speaking against the employer's interest in regulating the speech, and ultimately concluded that Plaintiff's complaint sufficiently asserted a constitutional violation.

The majority then moved on to the issue of whether the constitutional right in question was "clearly established." It concluded:

> Under a liberal reading of the Complaint, Evans-Marshall was terminated due to a public outcry engendered by the assignment of protected material that had been approved by the Board. Such a claim dovetails with previous, meritorious claims in this circuit. *See Cockrel*, 270 F.3d at 1054-55; *Stachura*, 763 F.2d at 214-15.

Majority Opinion, at 232-233.

Though *Cockrel* and *Stachura* did involve successful First Amendment claims, I do not believe these cases can be said to have "clearly established" a constitutional violation in the present case. A number of circuit courts of appeal have explained that constitutional rights which require a particularized balancing test, such as the Pickering balancing test in this case, will rarely be "clearly established" for qualified immunity purposes. *See DiMeglio v. Haines*, 45 F.3d 790, 806 (4th Cir.1995) ("[O]nly infrequently will it be 'clearly established' that a public employee's speech on a matter of public concern is constitutionally protected, because the relevant inquiry requires a 'particularized balancing' that is subtle, difficult to apply, and not yet well-defined."); *see also Connick*, 461 U.S. at 154, 103 S.Ct. 1684, (" 'We do not deem it either appropriate or feasible to attempt to lay down a general standard against which all statements may be judged.'") (quoting *Pickering*, 391 U.S. at 569, 88 S.Ct. 1731); *see also Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir.1992) ("In determining whether the law was clearly established, we bear in mind that allegations of constitutional violations that require courts to balance competing interest may make it more difficult to find the law 'clearly established' when assessing claims of qualified immunity."); *Borucki v. Ryan*, 827 F.2d 836, 848 (1st Cir.1987) ("When the law requires a balancing of competing interest, . . . it may be unfair to charge an official with knowledge of the law in absence of a previously decided case with clearly analogous facts."); *Myers v. Morris*, 810 F.2d 1437, 1462 (8th Cir.) ("If the existence of a right or the degree of protection it warrants in a particular context is subject to a balancing test, the right can rarely be consi-

dered 'clearly established,' at least in the absence of closely corresponding factual and legal precedent."); *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir.) (A constitutional rule that "involves the balancing of competing interests" is "so fact dependent that the 'law' can rarely be considered 'clearly established.' "). I would follow these cases and conclude that Evans-Marshall's alleged Constitutional violation has not yet been "clearly established."

In addition, I find that the holdings of *Cockrel* and *Stachura* were limited to the facts before them and were very narrow. In *Cockrel*, the Court concluded: "[W]e hold that, on balance, the defendants' interests in an efficient operation of the school and a harmonious workplace do not outweigh the plaintiff's interests in speaking about the benefits of industrial hemp, an issue of substantial political and economic concern in Kentucky." Such a narrow holding may have clearly established a teacher's right to discuss the benefits of industrial hemp in the classroom, but it should not be read to have clearly established a broad constitutional right regarding "in the classroom" teacher speech.

The concurring opinion of Judge Sutton also addressed the question of qualified immunity, stating that though it is "difficult for a plaintiff to surmount a qualified-immunity defense *after discovery*," it is also "difficult for a defendant to claim qualified immunity on the pleadings *before discovery* and before the parties (much less the courts) know what is being balanced against what." Concurring Opinion, at 234.

I am not persuaded with a before/after discovery distinction. There is no inherent difficulty in determining qualified immunity on a motion to dismiss. The district court simply must determine the defendant's conduct based on the facts as alleged in Plaintiff's complaint. *See Behrens v. Pelletier*, 516 U.S. 299, 309, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996) ("At that earlier stage, it is the defendant's conduct as *alleged in the complaint* that is scrutinized for 'objective legal reasonableness.' On summary judgment, however, the plaintiff can no longer rest on the pleadings, *see* Fed. Rule Civ. Proc. 56, and the court looks to the evidence before it (in the light most favorable to the plaintiff) when conducting the *Harlow* inquiry."). Granting Plaintiff all the factual inferences from her Complaint, I nevertheless find that the alleged conduct does not amount to a "clearly established" constitutional violation due to the inherent difficulty in applying the *Pickering* balancing test.

For the above reasons, I would grant qualified immunity to individual defendants Wray and Zigler. Because I disagree with the majority's conclusion as to this issue, I respectfully dissent.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed 03/16/04]

Case No. 3:03cv091

SHELLEY EVANS-MARSHALL,
Plaintiff,

vs.

BOARD OF EDUCATION OF TIPP CITY, *et al.*,
Defendants.

JUDGE WALTER HERBERT RICE

DECISION AND ENTRY OVERRULING DEFENDANTS' MOTION TO DISMISS (DOC. #3); CONFERENCE CALL SET

The Motion of the Defendants, seeking an Order of the Court dismissing Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(6) (Doc. #3), is deemed by this Court to be not well taken and same is, therefore, overruled in its entirety.

While this may well be litigation that will result in the sustaining of a properly documented Motion for Summary Judgment, dismissal on the basis of the Plaintiff's Complaint would be improper. A detailed review of the Plaintiff's Complaint, setting forth a First Amendment retaliation claim pursuant to 42

U.S.C. § 1983, considered in the light of the applicable law and under the standard that a motion to dismiss should be denied unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), convinces this Court that there are facts pled and reasonable inferences drawn therefrom which, should they be proven by a preponderance or greater weight of the evidence at trial, would sustain a verdict in favor of Plaintiff.

Based upon the Sixth Circuit's decision in *Cockrel v. Shelby County School District*, 270 F.3d 1036 (6th Cir. 2001), taking the facts in Plaintiff's Complaint as true and giving her the benefit of every reasonable inference to be drawn therefrom, it is clear that her assignment of certain books to her students constitutes speech, that the Complaint does not, upon its face, sufficiently detail the subject matter of the allegedly offensive books sufficiently to allow this Court to determine whether they touch upon matters of public concern and, further, that this Court cannot undertake the balancing test required by *Pickering v. Board of Education*, 391 U.S. 563 (1968), based upon the Complaint alone. Moreover, a reasonable inference to be drawn from the facts as pled by Plaintiff, if accepted by the trier of fact, may lead it to conclude that the decision to terminate her was based, at least in part, upon her decision to assign the books in question.

Finally, based upon the *Cockrel* decision, it simply cannot be said, based upon the present state of the pleadings, that the conduct of the individual defendants, acting in their roles as Superintendent of the school district and Principal of the school

that employed the Plaintiff, did not violate clearly established federal rights of which a reasonable person would have known.

WHEREFORE, based upon the aforesaid, this Court finds not well taken and does, therefore, overrule the Defendants' Motion to Dismiss (Doc. #3) in its entirety. Counsel of record will take note that a telephone conference call will be had, beginning at 8:30 a.m. on Friday, April 2, 2004, for the purpose of setting a trial date and other relevant dates leading to the resolution of this litigation.

/s/ Walter Herbert Rice
WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

March 16, 2004

Copies to:

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